

# MILITARY LAW REVIEW

THE MILITARY AND THE COURTS

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## INTRODUCTION

CIVILIAN COURTS AND THE MILITARY JUSTICE  
SYSTEM: COLLATERAL REVIEW OF  
COURTS-MARTIAL

Major Richard D. Rosen

THE AVAILABILITY AND SCOPE OF JUDICIAL  
REVIEW OF DISCRETIONARY MILITARY  
ADMINISTRATIVE DECISIONS

Captain John B. McDaniel

THE ADMINISTRATIVE PROCEDURE ACT AND THE  
MILITARY DEPARTMENTS

Major Thomas R. Folh

MEDICAL CARE RECOVERY—ANALYSIS OF THE  
GOVERNMENT'S RIGHT TO RECOVER ITS  
MEDICAL EXPENSES

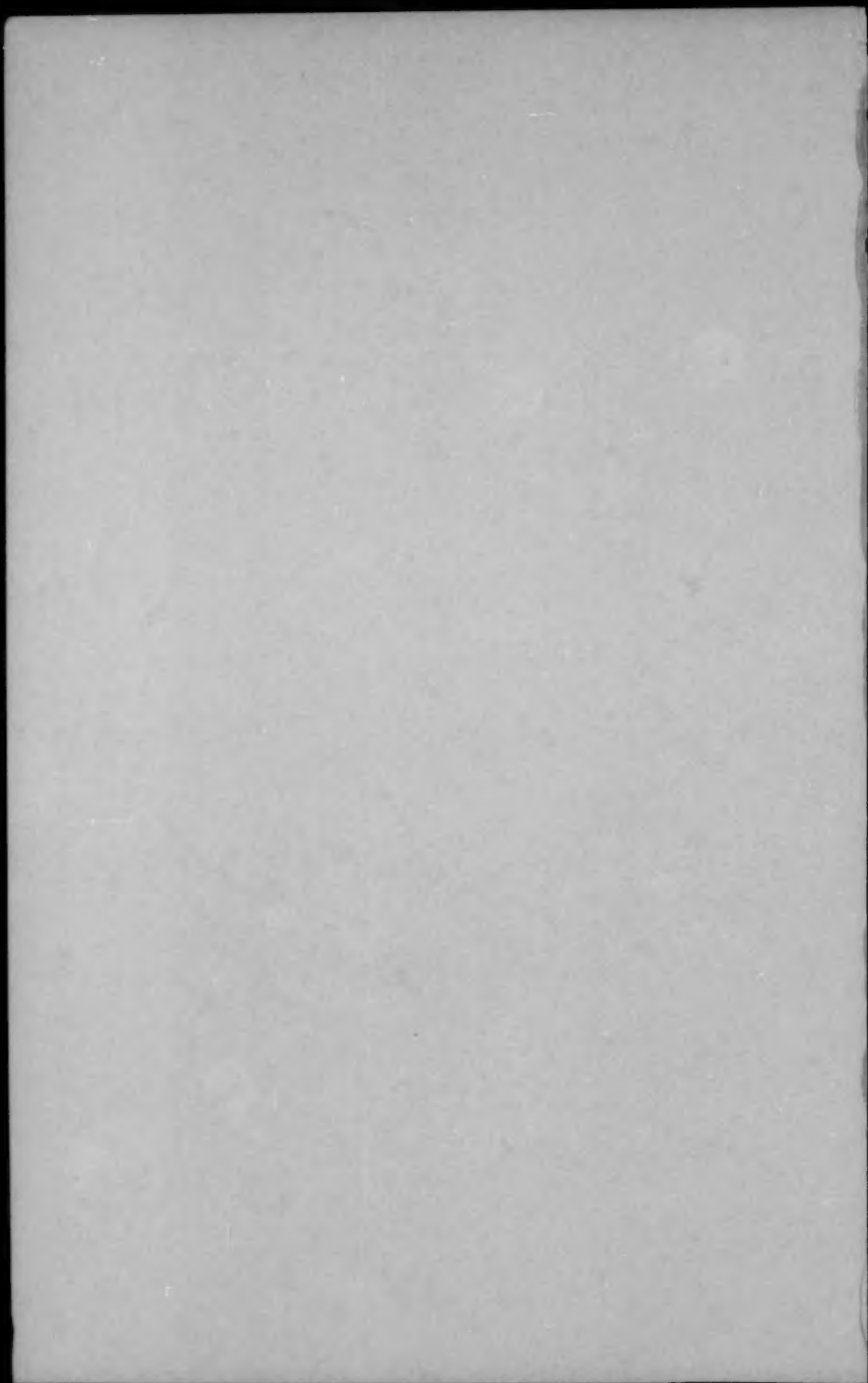
Major Bruce E. Kasold

THE RIGHT OF FEDERAL EMPLOYEES TO SUE THEIR  
SUPERVISORS FOR INJURIES CONSEQUENT UPON  
CONSTITUTIONAL VIOLATIONS

Lieutenant Commander Patrick W. Kelley

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The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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CAPTAIN STEPHEN J. KACZYNSKI, *Editor*  
MS. EVA F. SKINNER, *Editorial Assistant*

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## **MILITARY LAW REVIEW**

### **TABLE OF CONTENTS**

<i>Title</i>	<i>Page</i>
The Military and the Courts: Introduction Captain Stephen J. Kaczynski .....	1
Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial Major Richard D. Rosen .....	5
The Availability and Scope of Judicial Review of Discretionary Military Administrative Determinations Captain John B. McDaniel .....	89
The Administrative Procedure Act and the Military Departments Major Thomas R. Folk .....	135
Medical Care Recovery—Analysis of the Government's Right to Recover Its Medical Expenses Major Bruce E. Kasold .....	161
The Right of Federal Employees to Sue Their Supervisors For Injuries Consequent Upon Constitutional Violations Lieutenant Commander Patrick W. Kelley .....	211

## MILITARY LAW REVIEW

**SUBMISSION OF WRITINGS:** Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

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## THE MILITARY AND THE COURTS: CURRENT ISSUES INTRODUCTION

by Captain Stephen J. Kaczynski\*

Our society has increasingly become a litigious one. Those parties who feel themselves injured or disappointed by the action or inaction of another are more and more often likely to resort to the legal processes for redress of the purported grievance. The resulting litigation has ranged from the absurdity of a lawsuit over the call of a high school football referee to the seriousness of the discovery of a tort for "wrongful life."

The federal government in general and the military in particular have not been immune to this litigious trend. In lawsuits challenging the military justice system or military administrative procedures, or in cases initiated by the military to recoup medical costs incurred by the United States, the judge advocate may increasingly be faced with the delivery of legal advice concerning matters that had been at least infrequent, and possibly alien, to that attorney only a short while ago.

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\*Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, 1983 to present. Formerly assigned as Editor, *The Army Lawyer*, The Judge Advocate General's School, 1982-83; Defense Counsel, U.S. Army Trial Defense Service, Hawaii Field Office, Schofield Barracks, Hawaii, 1981-82; Trial Counsel, Assistant Chief of Military Justice, 25th Infantry Division, Schofield Barracks, Hawaii, 1979-81. LL.M., University of Virginia, 1984; J.D., cum laude, 1978, B.A., summa cum laude, 1976, St. John's University. Distinguished Graduate, 89th Judge Advocate Officer Basic Course, 1979. Author of *Admissibility of Illegally Obtained Evidence: A Comparative Study in Modern Legal Systems* (Cyclopedia (K. Redden ed. 1984); *America At War: Combatting Drugs in the Military*, 19 New Eng. L. Rev. 287 (1983-84); *From O'Callahan to Chappell: The Burger Court and the Military*, 18 U. Richmond L. Rev. 235 (1984); *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared*, 101 Mil. L. Rev. 83 (1983); "Reversing" the Freedom of Information Act: *Legislative Intention or Judicial Invention?*, 51 St. John's L. Rev. 734 (1977); *Significant Contacts Test Extended to Breach of Warrant Claims for Purposes of Borrowing Statute*, 51 St. John's L. Rev. 202 (1976); *Of Good Faith and Good Law: United States v. Leon and the Military Justice System*, *The Army Lawyer*, Nov. 1984, at 1 (co-author); *A Helping Hand: The Victim and Witness Protection Act of 1982*, *The Army Lawyer*, Oct. 1984, at 24; *Nix v. Williams and the Inevitable Discovery Exception to the Exclusionary Rule*, *The Army Lawyer*, Sept. 1984, at 1; *The Commander and the Defense Counsel*, *Infantry*, Nov.-Dec. 1983, at 23; "I Did What!" *The Defense of Involuntary Intoxication*, *The Army Lawyer*, Apr. 1983, at 1; *Inevitable Discovery—Reprise*, *The Army Lawyer*, Mar. 1983, at 21; *Salvaging the Unsavable Search: The Doctrine of Inevitable Discovery*, *The Army Lawyer*, Aug. 1982, at 1; "We Find the Accused (Guilty) (Not Guilty) of Homicide": *Toward a New Definition of Death*, *The Army Lawyer*, June 1982, at 1, *School of the Soldier: Remedial Training or Prohibited Punishment*, *The Army Lawyer*, June 1981, at 17. Member of the bars of the State of New York, the U.S. Army Court of Military Review, the United States Court of Military Appeals, and the United States Supreme Court.

In this issue, the *Military Law Review* has collected articles dealing with the subject of the military and the courts. In the lead article, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, the author discusses the history and legal development of the involvement of the federal civilian courts in the review of the military justice system. The lack of a uniform approach among the federal courts to the proper scope of review to be accorded determinations of the military justice system is noted and a standard approach is posited.

Military administrative decisions may also become the subject of challenge by those allegedly aggrieved by them. In *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, the author attempts to construct a framework within which such administrative decisions may be reviewed. Particular attention is paid to the degree to which the discretion of the military departments should be respected by the reviewing court.

The degree to which the Administrative Procedure Act should apply at all to the military departments is studied in the third article. In *The Administrative Procedure Act and the Military Departments*, the author analyzes the structure of the Act and its exceptions and attempts to predict the most fertile area for litigation in the future.

The recovery, where possible, of medical costs incurred by the federal government has been rated as a top priority by The Judge Advocate General. The process, however, is not a simple one, and the law will vary from jurisdiction to jurisdiction. In an effort to familiarize the recovery judge advocate with the five basic methods through which the government may recover its medical costs, *Medical Care Recovery—An Analysis of the Government's Right to Recover Its Medical Expenses* sets forth, in a detailed, handbook-type format, the various avenues available for the recoupment of those costs. In conclusion, the author proposes that there are two issues on which the federal government has needlessly acquiesced and seeks to encourage new efforts in this extremely important area of the law.

In the final article, *The Right of Federal Employees to Sue Their Supervisors For Injuries Consequent Upon Constitutional Violations*, the author ventures into an area of the law that has taken on new significance since the United States Supreme Court's 1983 decision in *Bush v. Lucas*. In that case, the Court foreclosed the availability of a lawsuit premised upon an alleged constitutional tort brought by a federal employee against his supervisor. The history behind the decision and the limitations and ramifications of it are

analyzed. The author concludes that the immunity afforded the supervisor is not as broad as the supervisor might prefer.

The areas of the law discussed in this issue are rife for litigation and further development in the courts and in the Congress. With this issue, the Editorial Board hopes to provoke the judge advocate to creative thought about such issues in order to contribute positively to the discussion of these issues in the future.





## CIVILIAN COURTS AND THE MILITARY JUSTICE SYSTEM: COLLATERAL REVIEW OF COURTS-MARTIAL

by Major Richard D. Rosen\*

*The article examines the historical relationship between the civilian and military courts, with emphasis on current developments in the law. The federal courts do not presently apply a uniform standard of collateral review to military proceedings. This divergence in approach prejudices the rights of military claimants and threatens to undermine the vitality of the military justice system. This author proposes a standard of collateral inquiry that would strike a balance between the roles of the federal judiciary and the military courts.*

How much . . . is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen!<sup>1</sup>

A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.<sup>2</sup>

### I. INTRODUCTION

Historically, the relationship between the civilian courts and the military justice system has been marked with mistrust,<sup>3</sup> misunder-

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\*Judge Advocate General's Corps, United States Army. Currently assigned as an Instructor, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, 1984 to present. Formerly assigned to the Litigation Division, Office of The Judge Advocate General, U.S. Army, 1980-83; Office of the Staff Judge Advocate, V Corps, Frankfurt, Federal Republic of Germany, 1978-80. J.D., University of Miami School of Law, 1973; B.A., Ohio State University, 1970. Distinguished Graduate, 32d Judge Advocate Officer Graduate Course, 1984; Distinguished Graduate, 85th Judge Advocate Officer Basic Course, 1977; Distinguished Graduate, Adjutant General Officer Basic Course, 1974. Author of *Consumer Class Actions Under the New Jersey Consumer Fraud Act*, 26 U. Miami L. Rev. 450 (1972). Member of the bar of the State of Florida. This article is based upon a thesis submitted in partial fulfillment of the requirements for completion of the 32d Judge Advocate Officer Graduate Course.

<sup>1</sup>W. Blackstone, Commentaries \*416.

<sup>2</sup>O'Callahan v. Parker, 395 U.S. 258, 266 (1969) (footnote omitted).

<sup>3</sup>See, e.g., Schlesinger v. Councilman, 420 U.S. 738, 762-66 (1975) (Brennan, J., dissenting); O'Callahan v. Parker, 395 U.S. 258, 265-66 (1969); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955).

standing,<sup>4</sup> and even antipathy.<sup>5</sup> Until recently, however, civilian judicial intrusion into court-martial proceedings was relatively circumscribed and predictable.<sup>6</sup> Prior to World War II, "there was a nearly monolithic harmony"<sup>7</sup> with the proposition that civil court review of court-martial proceedings, being solely collateral in character,<sup>8</sup> must be limited to technical issues of jurisdiction; that is, whether the court-martial was properly convened and constituted, whether it had jurisdiction over the subject-matter and the person of the accused, and whether the sentence adjudged was duly approved and authorized by law.<sup>9</sup> With the expansion of federal habeas relief from civilian criminal convictions immediately preceding World War II,<sup>10</sup> the harmony began to dissolve. Relying on the widening scope of inquiry in civilian habeas corpus, a number of lower federal courts reviewed allegations of constitutional deprivations in collateral challenges to court-martial convictions.<sup>11</sup> The harmony disappeared al-

<sup>4</sup>See Poydasheff & Suter, *Military Justice?—Definitely!*, 49 Tul. L. Rev. 588 (1975); Zimmermann, *Civilian v. Military Justice*, Trial, Oct. 1981, at 34.

<sup>5</sup>See, e.g., *Ex parte Henderson*, 11 F. Cas. 1067, 1078 (C.C.D. Ky. 1878) (No. 6,349); *Brooks v. Daniels*, 39 Mass. (22 Pick.) 498, 501 (1839); *People ex rel. Garling v. Van Allen*, 55 N.Y. 31, 39-40 (1873). See also M. Hale, *The History of the Common Law of England* 26 (3d ed. London 1739) (1st ed. London 1713); Comment, *Federal Civilian Court Intervention in Pending Courts-Martial & the Proper Scope of Military Jurisdiction Over Criminal Defendants: Schlesinger v. Councilman & McClucas v. De Champlain*, 11 Harv. C.R.-C.L. L. Rev. 437 (1976) [hereinafter cited as Comment, *Federal Civilian Court Intervention in Pending Courts-Martial*].

<sup>6</sup>Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum. L. Rev. 40, 43-44 (1961); Note, *Judicial Review of Courts-Martial*, 7 Geo. Wash. L. Rev. 503 (1938-39).

<sup>7</sup>Bishop, *supra* note 6, at 43.

<sup>8</sup>See, e.g., *In re Vidal*, 179 U.S. 126 (1900); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).

<sup>9</sup>See, e.g., *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *Collins v. McDonald*, 258 U.S. 416, 418 (1922); *Givens v. Zerbst*, 255 U.S. 11, 19-20 (1921); *Mullan v. United States*, 212 U.S. 516, 520 (1909); *Carter v. McClaughry*, 183 U.S. 365, 380-81 (1902); *Swain v. United States*, 165 U.S. 553, 555 (1897); *United States v. Grimley*, 137 U.S. 147, 150 (1890); *Smith v. Whitney*, 116 U.S. 167, 176-77 (1886); *Wales v. Whitney*, 114 U.S. 564, 570 (1885); *Keyes v. United States*, 109 U.S. 336, 339 (1883); *Ex parte Reed*, 100 U.S. 13, 23 (1879); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 81-82 (1858). See generally Fratcher, *Review by the Civil Courts of Judgments of Federal Military Tribunals*, 10 Ohio St. L.J. 271 (1949); Lobb, *Civil Authority Versus Military*, 3 Minn. L. Rev. 105, 113-14 (1919); Snedeker, *Habeas Corpus and Court-Martial Prisoners*, 6 Vand. L. Rev. 288, 295-304 (1953); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 Mil. L. Rev. 1, 29 (1971); Note, *Civilian Court Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1260 (1969); Note, *Collateral Attack on Courts-Martial*, 7 Geo. Wash. L. Rev. 503 (1938-39).

<sup>10</sup>See, e.g., *Waley v. Johnston*, 316 U.S. 101 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Frank v. Magnum*, 237 U.S. 309 (1915).

<sup>11</sup>See, e.g., *Montalvo v. Hiatt*, 174 F.2d 645 (5th Cir.), cert. denied, 338 U.S. 874 (1949); *Benjamin v. Hunter*, 169 F.2d 512 (10th Cir. 1948); *United States ex rel. Weintraub v. Swenson*, 165 F.2d 756 (2d Cir. 1948); *United States ex rel. Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944); *Schita v. King*, 133 F.2d 283 (8th Cir. 1943); *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946); *Shapiro v. United States*, 60 F. Supp. 205 (Ct. Cl. 1947).

together in 1953 when the Supreme Court, in *Burns v. Wilson*,<sup>12</sup> "officially" opened collateral attacks on military sentences to constitutional claims.<sup>13</sup>

In *Burns*, a plurality decision, the Court acknowledged that service members have constitutional rights,<sup>14</sup> but held that civilian courts could review only those constitutional claims that the military had not "fully and fairly" considered.<sup>15</sup> The Court, however, provided little direction for applying this "full and fair" consideration test,<sup>16</sup> causing considerable confusion among the lower federal courts.<sup>17</sup> Consequently, the lower courts took diverse approaches to constitutional challenges to military convictions,<sup>18</sup> ranging from strict refusal to review issues considered by the military courts<sup>19</sup> to *de novo* review of constitutional claims.<sup>20</sup> The Supreme Court added to the confusion by its virtual silence in the matter, despite being presented with several opportunities to clarify its position.<sup>21</sup>

In recent years, while some federal courts continue to adhere, at least in part, to *Burns*,<sup>22</sup> or attempt to articulate other restrictions on the scope of collateral review,<sup>23</sup> a growing number of courts have entertained collateral challenges to courts-martial without any ap-

<sup>12</sup>346 U.S. 137 (1953).

<sup>13</sup>Just three years before its decision in *Burns*, the Court disapproved the extension of habeas review to constitutional claims, holding that "[t]he single inquiry, the test, is jurisdiction." *Hiatt v. Brown*, 339 U.S. 103, 111 (1950) (quoting *United States v. Grimley*, 137 U.S. 147, 150 (1890)).

<sup>14</sup>*Burns v. Wilson*, 346 U.S. at 139.

<sup>15</sup>*Id.* at 142.

<sup>16</sup>See Note, *Federal Habeas Corpus Jurisdiction Over Court-Martial Proceedings*, 20 Wayne L. Rev. 919, 924 (1974).

<sup>17</sup>*Id.* at 924-26. See also Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 Ohio St. L.J. 193, 206 (1966); Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 387 (1966).

<sup>18</sup>See, e.g., Note, *Civilian Court Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1262 (1969); *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1217-18 (1969) [hereinafter cited as *Developments in the Law—Federal Habeas Corpus*]; Note, *Civilian Review of Military Habeas Corpus Petitions: Is Justice Being Served?*, 44 Fordham L. Rev. 1228, 1235-36 (1976).

<sup>19</sup>E.g., *Palomera v. Taylor*, 344 F.2d 937 (10th Cir.), cert. denied, 382 U.S. 946 (1965).

<sup>20</sup>E.g., *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965).

<sup>21</sup>E.g., *Parker v. Levy*, 417 U.S. 733 (1974), rev'g 478 F.2d 772 (3d Cir. 1973); *United States v. Augenblick*, 393 U.S. 348 (1969), rev'g 377 F.2d 586 (Ct. Cl. 1967), and rev'g sub nom. *Juhl v. United States*, 383 F.2d 1009 (Ct. Cl. 1967).

<sup>22</sup>E.g., *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983); *Kehrli v. Sprinkle*, 524 F.2d 328 (10th Cir. 1975), cert. denied, 426 U.S. 860 (1976).

<sup>23</sup>E.g., *Calley v. Callaway*, 519 F.2d 184 (5th Cir.) (en banc), cert. denied, 425 U.S. 911 (1975).

parent limitations.<sup>24</sup> There is little to distinguish the latter line of cases from those involving direct appeals.<sup>25</sup>

This trend is disturbing for a number of reasons. First, because of the divergent approaches adopted by the federal courts, the scope of review accorded a claim will be dependent upon the particular district or circuit in which the claimant files his petition. In habeas corpus cases, this situs will be the district or circuit in which the claimant, through no choice of his own, happens to be confined.<sup>26</sup> Moreover, courts that undertake unlimited *de novo* review of constitutional claims, regardless of the prior proceedings and determinations of the military tribunals, fail to accord the deference due the military courts by virtue of their independent constitutional source<sup>27</sup>

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<sup>24</sup>*E.g.*, Schlomann v. Ralston, 691 F.2d 401 (8th Cir. 1982), cert. denied, 103 S.Ct. 1229 (1983).

<sup>25</sup>Indeed, in Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977), Judge Leventhal, in a concurring opinion, wrote that, where a claimant was not afforded military appellate court review because his sentence was not sufficiently severe, "I feel free to approach [the claimant's constitutional claims] almost as though I were a member of the Court of Military Appeals undertaking direct review." *Id.* at 631 (Leventhal, J., concurring).

<sup>26</sup>The lack of uniformity among the courts in assessing the proper scope of pre-Burns habeas corpus review of court-martial convictions was the source of some criticism. See Bishop, *supra* note 6, at 40-43. For example, in Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947), a military prisoner, Private Anthony, successfully obtained his release on habeas corpus because of errors in his court-martial proceedings amounting to a denial of due process. His co-accused, Private Arnold, who was tried jointly with Anthony, but who happened to be imprisoned in a different judicial district, was denied relief because the court refused to extend its review beyond technical jurisdiction. Arnold v. Cozart, 75 F. Supp. 47 (N.D. Tex. 1948). The present disparity among the courts conceivably could lead to similar abuses.

<sup>27</sup>"A military tribunal is an Article I legislative court with jurisdiction independent of the judicial power created and defined by Article III." Gaos v. Mayden, 413 U.S. 665, 686 (1973).

"... Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 73 L.Ed. 2d 598, 612 (1982) (quoting Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858)). See also Burns v. Wilson, 346 U.S. 137, 139-40 (1953); Kurtz v. Moffitt, 115 U.S. 487, 500 (1885). See generally Rostker v. Goldberg, 453 U.S. 57, 66-67 (1981); Orloff v. Willoughby, 345 U.S. 83, 91 (1953).

Congress, for the first time in the nation's history, recently extended to the Supreme Court the power to directly review the decisions of the Court of Military Appeals through writs of certiorari. Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393. The possible effect of the Act on future collateral challenges is discussed below. See text accompanying notes 457-84 *infra*.

and their expertise in tailoring individual rights to military requirements.<sup>28</sup>

In light of the traditional judicial mistrust and antipathy towards the military justice system, unlimited federal court review of court-martial convictions might well emasculate the role of the military courts in balancing the rights of service members against the needs of the service.<sup>29</sup> On the other hand, federal judges are the final arbiters of federal constitutional law.<sup>30</sup> They should be afforded a role in the resolution of constitutional claims raised in collateral attacks on courts-martial beyond merely ascertaining whether the military courts considered the claims.<sup>31</sup> While it is apparent that a middle

<sup>28</sup>"Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference." *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). See also *Burns v. Wilson*, 346 U.S. 137, 140 (1953); *Calley v. Callaway*, 519 F.2d 184, 200-03 (5th Cir.), cert. denied, 425 U.S. 911 (1975); *Hodges v. Brown*, 500 F. Supp. 25, 29 (E.D. Pa. 1980), aff'd, 649 F.2d 859 (3d Cir. 1981); *Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972). See generally Note, *Civilian Court Review of Court-Martial Adjudications*, 69 Colum. L. Rev. 1259, 1278 (1969); *Developments in the Law—Federal Habeas Corpus*, supra note 18, at 1225; Note, *Federal Habeas Corpus Jurisdiction Over Court-Martial Proceedings*, 20 Wayne L. Rev. 919, 931-32 (1974); Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 400-04 (1966). But see Comment, *Federal Civilian Court Intervention in Pending Courts-Martial*, supra note 5, at 467-68 (argues military courts have no expertise to add to the resolution of constitutional issues).

In this regard, the Court of Military Appeals generally has applied the protections of the Bill of Rights to service members, *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976), except where military requirements dictate a different rule. See, e.g., *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981) (eliminating oath requirement for search authorizations). The Supreme Court, in a number of different contexts, has upheld the relaxation of various constitutional protections for military personnel. See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980) (First Amendment); *Middendorf v. Henry*, 425 U.S. 25 (1976) (Sixth Amendment); *Greer v. Spock*, 424 U.S. 828 (1976) (First Amendment); *Parker v. Levy*, 417 U.S. 733 (1974) (First Amendment); *Reaves v. Ainsworth*, 219 U.S. 296 (1911) (Fifth Amendment). See generally Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. 293, 324 n.172 (1957).

<sup>29</sup>See note 5, supra. The danger is that federal judges, who have had only limited association with the armed forces, will give little credence to the determinations of the military courts because of "knee-jerk" disapprobation of the military. In this regard, lawyers in general have too often accepted as gospel "highly misleading and inaccurate generalizations concerning" the military justice system. Poydashoff & Suter, supra note 4, at 588. See also Zimmermann, supra note 4, at 34; Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 Mil. L. Rev. 1, 2 (1974). A fortiori, unquestioned acceptance of such generalizations by lawyers appointed to the federal bench can only harm the independence and integrity of the military courts.

<sup>30</sup>See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 764-65 (1975) (Brennan, J., dissenting). Cf. *Brown v. Allen*, 344 U.S. 443, 506 (1953) (Frankfurter, J.) (habeas review of state criminal proceedings).

<sup>31</sup>See, e.g., *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1380 (9th Cir.), cert. denied, 454 U.S. 864 (1981); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 992 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970); *Bishop*, supra note 6, at 70-71; *Katz & Nelson*, supra note 17, at 217-18.

ground must be reached, the problem is determining the proper role for the federal courts. In seeking to define that role, it is important to understand how the present state of affairs evolved.<sup>32</sup>

## II. THE EVOLUTION OF CIVILIAN COURT REVIEW OF COURTS-MARTIAL

From an historical perspective, the relationship between the civilian courts and the military justice system fits relatively neatly into three distinct periods. Until World War II, collateral challenges were limited to questions of technical jurisdiction. Beginning in about 1943, lower federal courts began reviewing the constitutional claims of military habeas corpus petitioners. This expansion of the scope of review was consistent with Supreme Court decisions in civilian habeas cases. This line of cases culminated with the Supreme Court's landmark decision in *Burns v. Wilson*.<sup>33</sup> Finally, the post-*Burns* era, from 1953 to the present, has been marked by a lack of uniformity in the decisions of the lower federal courts. Before examining each of these periods, however, it is necessary to consider the origins of the relationship between American civilian and military courts through a brief examination of early English experiences, from which our system has borrowed so heavily.<sup>34</sup>

### A. EARLY ENGLISH EXPERIENCE

The evolution of the relationship between the common law and the military courts of England is intertwined with the complex and historic struggles between the Crown and the Parliament, and between the common law courts and other rival courts.<sup>35</sup> The outcome was the supremacy of Parliament over the King,<sup>36</sup> and the sub-

<sup>32</sup>Cf. *Fay v. Noia*, 372 U.S. 391, 99 (1963) (inquiry into historical development of the writ of habeas corpus necessary to determine the proper role of the writ).

<sup>33</sup>346 U.S. 137 (1953).

<sup>34</sup>See, e.g., W. Winthrop, *Military Law and Precedents* 22, 47-48 (2d ed. 1920 reprint); Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U.L. Rev. 983, 1054 (1978); Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 Ohio St. L.J. 337, 338 (1983); Schlueter, *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129, 144 (1980); *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1045.

<sup>35</sup>See Duker, *supra* note 34, at 983, 1007, 1015-25, 1025-36, 1042-54; Schlueter, *supra* note 34, at 139-44; *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1042-45.

<sup>36</sup>P. Mackendrick, D. Geanakoplos, J. Hexter & R. Pipes, *Western Civilization—Paleolithic Man to the Emergence of European Powers* 907-31 (W. Langer, ed. 1968); H. Wells, *The Outline of History* 810-20 (4th ed. 1949); Schlueter, *supra* note 34, at 143.



servience of military and other tribunals to the common law courts.<sup>37</sup>

While some form of tribunal for the trial of military offenses appears to have existed as early as Greek and Roman times,<sup>38</sup> the origin of English courts-martial is to be found in the Court of Chivalry.<sup>39</sup> The court was brought to England by William the Conqueror as part of his supreme court, the *Aula Regis*.<sup>40</sup> The principal participants of the court were the lord high constable, who commanded the royal armies, and the lord marshal, who was next in rank to the constable and managed the army's personnel.<sup>41</sup> In the thirteenth century, Edward I partitioned the Court of Chivalry from the *Aula Regis* "to provide a separate forum for litigation of matters concerned primarily with military discipline."<sup>42</sup>

The Court of Chivalry originally had broad jurisdiction over both civil and criminal matters.<sup>43</sup> Its extensive jurisdiction, however, proved to be its downfall.<sup>44</sup> Because it encroached on the prerogatives of the common law courts, its powers were gradually curtailed by both the Crown and Parliament.<sup>45</sup> Moreover, its criminal jurisdiction was dependent upon the participation of the lord high constable;<sup>46</sup> however, the last lord high constable, Edward, Duke of

<sup>37</sup>See, e.g., *Grant v. Gould*, 126 Eng. Rep. 434, 450 (C.P. 1792); M. Hale, *supra* note 5, at 28.

<sup>38</sup>W. Winthrop, *supra* note 34, at 17-18, 45; Schlueter, *supra* note 34, at 131-36.

<sup>39</sup>S. Adye, *A Treatise on Courts Martial* 1-2 (8th ed. London 1810) (1st ed. London 1769); W. Winthrop, *supra* note 34, at 46. The court has also been referred to as the "Court of the High Constable & Marshal of England," the "Court of Arms," and the "Court of Honour." *Id.* See also Schlueter, *supra* note 34, at 136.

<sup>40</sup>S. Adye, *supra* note 39, at 2; 1 McArthur, *the Principles and Practices of Naval & Military Courts Martial* 17-18 (4th ed. 1813) (1st ed. London 1792); W. Winthrop, *supra* note 34, at 46; Schlueter, *supra* note 34, at 136. It should be noted that "[w]hen the Normans arrived in England in 1066, they found no central court system." Small private franchise courts appear to have been the primary means of dispensing justice before the invasion. Duker, *supra* note 34, at 987.

<sup>41</sup>S. Adye, *supra* note 39, at 1-2; 1 McArthur, *supra* note 40, at 18-19; Schlueter, *supra* note 34, at 136. These officials date from the time of the Frankish Kings. W. Winthrop, *supra* note 34, at 46.

<sup>42</sup>Schlueter, *supra* note 34, at 136. The reason for Edward's subdivision of the court is unclear. It appears that since the *Aula Regis* moved with the King, it proved to be awkward and unwieldy. *Id.* Once removed from the *Aula Regis*, the Court of Chivalry became more mobile, and even followed the army in time of war. *Id.* One commentator has suggested, however, that Edward I found the *Aula Regis* to be "obnoxious to the people, and dangerous to the government." 1 McArthur, *supra* note 40, at 18.

<sup>43</sup>S. Adye, *supra* note 39, at 2-7; M. Hale, *supra* note 5, at 25-26; 1 McArthur, *supra* note 40, at 18-19; W. Winthrop *supra* note 34, at 46; Schlueter, *supra* note 34, at 137.

<sup>44</sup>Schlueter, *supra* note 34, at 137-38.

<sup>45</sup>W. Winthrop, *supra* note 34, at 46; Schlueter, *supra* note 34, at 137-38.

<sup>46</sup>C. Walton, *History of the British Standing Army* 536 (1894). See also S. Adye, *supra* note 39, at 8-9; 1 McArthur, *supra* note 40, at 19; W. Winthrop, *supra* note 34, at 46; Schlueter, *supra* note 34, at 137.

Buckingham, was executed for treason by Henry VIII in 1521.<sup>47</sup> Thereafter, the office of constable reverted to the Crown and no permanent high constable was again appointed.<sup>48</sup> Although the Court of Chivalry was never formally abolished, it ultimately died of atrophy.<sup>49</sup>

Even during the period of the court's existence and its broad exercise of jurisdiction, limits were imposed on the scope of military criminal law. The preference was for trial in the common law courts,<sup>50</sup> especially in time of peace. In 1322, Thomas, Earl of Lancaster, was condemned to death at Pontefract by a military court composed of King Edward II and various noblemen.<sup>51</sup> The judgment was reversed by Parliament in 1327<sup>52</sup> on the ground "that in time of peace no man ought to be adjudged to death for treason or an other offense without being arraigned and held to answer; and that regularly when the King's courts are open it is a time of peace in judgment of law."<sup>53</sup>

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<sup>47</sup>S. Adye, *supra* note 39, at 7; 1 McArthur, *supra* note 40, at 19; W. Winthrop, *supra* note 34, at 46; Schlueter, *supra* note 34, at 137. For an account of the events leading to Buckingham's execution, see J. Scarisbrick, *Henry VIII* 120-23 (1968).

<sup>48</sup>C. Walton, *supra* note 46, at 530; W. Winthrop, *supra* note 34, at 46; Schlueter, *supra* note 34, at 137. Apparently Henry VIII and his successors did not again appoint a lord high constable because the power of the office was "deemed too ample for a subject. . . ." S. Adye, *supra* note 39, at 7; 1 McArthur, *supra* note 40, at 19. Indeed, both Adye and McArthur, leading English writers of military treatises in the eighteenth century, recount a conversation between Henry VIII and his Chief Justice. When asked by Henry how far the power of the lord high constable extended, the Chief Justice "declined answering, and said the decision of that question belonged to the law of arms, and not the law of England." S. Adye, *supra* note 39, at 7 (footnote omitted); 1 McArthur, *supra* note 40, at 19 (footnote omitted).

<sup>49</sup>Schlueter, *supra* note 34, at 138.

<sup>50</sup>M. Hale, *supra* note 5, at 25; C. Walton, *supra* note 46, at 536. The common law courts also were not reluctant to intervene in the court's exercise of civil jurisdiction. In the Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613), Justice Coke upheld a damages verdict awarded to a guarantor of a debt arrested for non-payment pursuant to process issued by the Marshal's Court. The plaintiff was not a member of the King's household and, therefore, not subject to the court's jurisdiction. In *Chambers v. Jennings*, 91 Eng. Rep. 469 (K.B. 1702), perhaps the last case from the Court of Chivalry, see Schlueter, *supra* note 34, at 138 n.31, the Court of the King's Bench prohibited an action for damages in the Court of Chivalry for slanderous remarks made to a knight. Justice Holt, writing for the court, held that the Court of Chivalry had no jurisdiction to entertain the action. A writ of prohibition was issued to the earl marshal to enjoin the lawsuit.

<sup>51</sup>W. Blackstone, *supra* note 1, at 413. See also C. Walton, *supra* note 46, at 532. Sir Matthew Hale, in his treatise on the history of English common law, described the case as involving Edmond, Earl of Kent, who was tried by military court at Pomsret. M. Hale, *supra* note 5, at 27.

<sup>52</sup>W. Blackstone, *supra* note 1, at 413.

<sup>53</sup>*Ex parte Milligan*, 71 U.S.(4 Wall.) 2, 128 (1866).



With the demise of the Court of Chivalry, military justice was administered principally by martial courts or councils convened under various Articles of War issued by the Crown.<sup>54</sup> Ostensibly, these courts only had jurisdiction over soldiers in time of war;<sup>55</sup> although, on a number of occasions, the Crown "expanded or attempted to expand, the jurisdiction of these tribunals over civilians or over soldiers in the peacetime armies."<sup>56</sup> In reality, these tribunals more nearly resembled martial law than courts-martial of modern times, and were probably responsible for the immense mistrust of military law voiced by the leading legal commentators of the time.<sup>57</sup> Indeed, the flagrant abuses of Charles I in this regard were the primary basis for the enactment of the Petition of Rights in 1628.<sup>58</sup> Thereafter, Parliament slowly acquired more control over the military and the conduct of military trials.<sup>59</sup>

In 1689, in response to a massive desertion of English and Scotch troops,<sup>60</sup> Parliament enacted the First Mutiny Act. Among other things, the Act prohibited the infliction of the death penalty within the Kingdom by courts-martial except upon conviction for mutiny, sedition, or desertion.<sup>61</sup> It also legitimized the peacetime standing

<sup>54</sup>W. Winthrop, *supra* note 34, at 46-47; Schlueter, *supra* note 34, at 139.

<sup>55</sup>Schlueter, *supra* note 34, at 139. Sir Edward Coke, writing in the early 17th Century, stated the law thusly: "that if a lieutenant or other, that hath commission of martial law, doth, in time of peace, hang or otherwise execute any man, by colour of martial law, this is murder, for it is against the *Magna Charta*." S. Adye, *supra* note 39, at 50 (citing E. Coke, 3 Institutes \*52).

<sup>56</sup>Schlueter, *supra* note 34, at 139. See also S. Adye 39, at 11-14; W. Winthrop, *supra* note 34, at 46-47.

<sup>57</sup>W. Winthrop, *supra* note 34, at 47. For a succinct statement reflecting Sir William Blackstone's opinion about military law, see note 1, *supra*, and the accompanying text. Sir Mathew Hale expressed his views this way:

But touching the Business of Martial Law, these Things are to be observed, *viz.*

. . . That in Truth and Reality it is not a Law, but something indulged rather than allowed as law; the Necessity of Government, Order and Discipline in an Army, is that only which can give those laws a Countenance. . . .

M. Hale, *supra* note 5, at 26.

<sup>58</sup>S. Adye, *supra* note 39, at 13-15; Schlueter, *supra* note 34, at 139-40. Charles I used courts-martial as a means of extracting money from the populace, thereby avoiding the need to call Parliament for new taxes. *Id.* He failed. *Id.* When he sought the money he needed from Parliament, he was forced to assent to the Petition of Rights, which, among other things, ended the courts-martial of civilians. *Id.*

<sup>59</sup>Schlueter, *supra* note 34, at 140.

<sup>60</sup>Following the "Glorious Revolution" of 1689, and the ascendance of William and Mary to the throne of England, English and Scotch troops embarking for Holland mutinied and openly declared their allegiance to the recently deposed James II. Parliament reacted quickly with the First Mutiny Act. I McArthur, *supra* note 40, at 22-23; Schlueter, *supra* note 34, at 142-43.

<sup>61</sup>W. Winthrop, *supra* note 34, at 47.

army.<sup>62</sup> Later versions of the Act provided, for the first time in English history, a general statutory basis for the Articles of War, which continued to govern the army;<sup>63</sup> theretofore, the Articles had been the product of royal prerogative.<sup>64</sup> By the time of the American Revolution, the British Army was governed by the Army Mutiny Act and the Articles of War.<sup>65</sup>

During Parliament's struggles with the Crown for ascendancy over the military, the common law courts devised various means to limit and control the jurisdiction of the other English courts, including courts-martial.<sup>66</sup> At the time of the American Revolution, however, common law court intervention into the proceedings and judgments of courts-martial was relatively confined. Generally, review was limited to insuring that the military tribunal did not exceed its jurisdiction.<sup>67</sup>

In *Grant v. Gould*,<sup>68</sup> Grant, who was a recruiting sergeant for the East India Company's 74th and 76th Regiments, sought to prohibit the execution of a sentence passed against him by general court-martial. He had been convicted of having advised and persuaded two

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<sup>62</sup>C. Walton, *supra* note 46, at 539. Until the First Mutiny Act, the only strictly constitutional force in England had been the militia. *Id.* at 529, 538.

<sup>63</sup>Schlueter, *supra* note 34, at 143.

<sup>64</sup>*Id.* See also W. Winthrop, *supra* note 34, at 19-20. The rules governing discipline in the Navy, on the other hand, had for years been based on statute. 1 McArthur, *supra* note 40, at 20-21. Blackstone found this Parliamentary control to be much more agreeable than the purely executive character of the Articles of War. W. Blackstone, *supra* note 1, at 419-20.

<sup>65</sup>W. Winthrop, *supra* note 34, at 18. The Mutiny Act and the Articles of War were replaced in 1879 by the Army Discipline and Regulation Act, and in 1881, by the Army Act. *Id.* at 20; Schlueter, *supra* note 34, at 143.

<sup>66</sup>The chief tool of the common law courts was habeas corpus. Duker, *supra* note 34, at 983; *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1042. The writ "originated as a device for compelling appearance before the King's judicial instrumentalities." Duker, *supra* note 34, at 1053. Later, it was a device wielded by the courts of England "to increase and to safeguard their jurisdictions." *Id.* at 1054. "A subject imprisoned by one court could be released by means of the writ issued by a rival court on the holding that the committing court lacked jurisdiction in the case." *Id.* See also *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1042-43.

<sup>67</sup>See generally *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1043. Justice Brennan, writing for the Supreme Court in *Fay v. Noia*, 372 U.S. 391, 404-05 (1963), suggested that, at common law, habeas corpus was available to review more than simply jurisdiction in the narrow sense, but for any commitment contrary to "fundamental law." Justice Brennan's interpretation of the historic function of the writ has been severely criticized. See Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 458-68 (1966). See also Schneekloth v. Bustamonte, 412 U.S. 218, 253 (1973) (Powell, J., concurring) ("recent scholarship has cast grave doubt on Fay's version of the writ's historic function").

<sup>68</sup>126 Eng. Rep. 434 (C.P. 1792). Sir Charles Gould, Knt., was "his Majesty's Judge Martial and Advocate General for the Army."

drummers in the Coldstream Regiment of the Foot Guards to desert "his Majesty's service, and to inlist [sic] into the service of the East India Company . . . ." <sup>69</sup> He was sentenced to be reduced to the rank of private, and to receive 1,000 lashes "on the bare back with a cat-o'-nine tails, by the drummers of such corps or corp, at such time or times, and in such proportions, as his Majesty should think fit to appoint . . . ." <sup>70</sup> Grant claimed the court-martial lacked jurisdiction over him, and, in addition, asserted a number of procedural errors in connection with the proceedings. <sup>71</sup>

Writing for the court, Lord Loughborough declared that military and naval courts were subject to the controlling authority "which the Courts of Westminster Hall have from time to time exercised, *for the purpose of preventing them from exceeding the jurisdiction given to them . . .*" <sup>72</sup> Finding jurisdiction in the case, <sup>73</sup> Lord Loughborough refused to inquire further:

The foundation of [a prohibition] must be, that the inferior court is acting without jurisdiction. It cannot be a foundation for a prohibition, that in the exercise of their jurisdiction the Court acted erroneously. That may be a matter of appeal where there is an appeal, or a matter of review: though the sentence of a court-martial is not subject to review, there are instances, no doubt, where, upon application to the crown, there have been orders to review the proceedings of courts-martial. <sup>74</sup>

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<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 436.

<sup>71</sup>In addition to claiming that he was not a soldier and not subject to court-martial jurisdiction, Grant asserted that there were evidentiary errors at his trial, that the offense of which he was convicted was not the one with which he was charged, that the offense of which he was convicted was not an offense cognizable by court-martial, and that his sentence was excessively severe. *Id.* at 434-35, 455.

<sup>72</sup>*Id.* at 450 (emphasis added).

<sup>73</sup>*Id.* at 451-55.

<sup>74</sup>*Id.* at 451. Lord Loughborough did review Grant's claims to determine whether they affected the jurisdiction of the military court. *Id.* at 451-55. See also *In the Matter of Poe*, 110 Eng. Rep. 942 (K.B. 1833) (court refused to issue a writ of prohibition to reverse the sentence of dismissal of an officer adjudged by a court-martial and carried into execution); *In re Mansergh*, 121 Eng. Rep. 764 (Q.B. 1861) (court refused to entertain petition for certiorari to quash sentence of court-martial acting within jurisdiction). But see *The Case of the Mutineers of the Bounty*, cited by petitioner's counsel in *The King v. Suddis*, 102 Eng. Rep. 119, 121-22 (K.B. 1801). According to Suddis' counsel, the sentence of one of the mutineers, William Muspratt, was stayed by the civilian courts, and Muspratt eventually released, because of evidentiary errors during his trial. *Id.* at 122. Suddis' counsel's version of the case was subsequently questioned. See Strassburg, *supra* note 29, at 6-7 n.28.

In *The King v. Suddis*,<sup>76</sup> the English courts showed similar restraint in denying habeas corpus relief to a soldier imprisoned under a sentence imposed by a court-martial at Gibraltar. The court held that its inquiry was limited to insuring that the military tribunal had jurisdiction over the case and the power to adjudge the punishment given. Any other objection was deemed to be an objection in error, and the court stated that it did not sit as a court of error in a collateral proceeding. Thus, as to claims beyond those of jurisdiction, the court had to presume the military court acted properly.<sup>76</sup>

Finally, in damages actions, perhaps the most widely-used means of collaterally challenging military convictions in eighteenth and early-nineteenth century England, courts generally, but not always, limited relief to instances in which military tribunals or commanders exceeded their jurisdiction in imposing punishment. For example, in *Barwis v. Keppel*,<sup>77</sup> the court held it had no jurisdiction at all to consider a soldier's action for malicious prosecution arising out of a court-martial conducted in Germany during one of England's wars with France:

By Act of Parliament to punish mutiny and desertion the King's power to make Articles of War is confined to his own dominions; when his army is out of his dominions he acts by virtue of his prerogative, and without the statute of Articles of War; and therefore you cannot argue upon either of them, for they are both to be laid out of this case, and flagrante bellow, the common law has never interfered with the army: inter arma silent leges. We think (as at present advised) we have no jurisdiction at all in this case . . . .<sup>78</sup>

<sup>76</sup>102 Eng. Rep. 119 (K.B. 1801).

<sup>76</sup>*Id.* at 123. *Cf. Blake's Case*, 105 Eng. Rep. 440 (K.B. 1814) (writ denied to petitioner claiming undue delay in bringing case to trial).

<sup>77</sup>95 Eng. Rep. 831 (K.B. 1766).

<sup>78</sup>*Id.* at 833. *See also Mann v. Owen*, 109 Eng. Rep. 22 (K.B. 1829) (damages action for assault and false imprisonment held not to lie where court-martial had jurisdiction); *Warden v. Bailey*, 128 Eng. Rep. 253 (C.P. 1811) (action for false imprisonment held to be available where court-martial conviction for disobedience was based on illegal order); *Moore v. Bastard*, (C.P. 1806), *reported in*, 2 McArthur, *supra* note 40, at 194-200 (action for false imprisonment upheld where plaintiff confined by court-martial for offense over which military court had no jurisdiction). *But see the case of Frye v. Ogle* (C.P. 1743), *reported in* 1 McArthur, *supra* note 40, at 268-70, 436-39. *See also S. Adye*, *supra* note 39, at 59-60. In *Frye*, a lieutenant of the Marines, serving on board the Man-of-War "Oxford," at Port Royal, Jamaica, was tried by court-martial for disobedience of an order of his captain. *Id.* at 263, 436. At trial, the evidence produced against Frye consisted of several depositions of "illiterate persons" unknown to Frye. *Id.* On this evidence he was convicted and sentenced to 15 years imprisonment. *Id.* Upon his return to England, the King remitted his sentence.

*Id.* at 269. Thereafter, Frye sued the president of the court-martial, Sir Charloner Ogle, and obtained a verdict in his favor of 1,000 pounds, *Id.*, although the court-martial apparently had jurisdiction to hear the case and to try Lieutenant Frye.

The story did not end, however, with Frye's successful suit against Sir Ogle. Lord Chief Justice Willes of the Court of Common Pleas informed Frye that he was at liberty to bring an action for damages against any other members of the court-martial he could "meet with." *Id.* at 269. On Lieutenant Frye's subsequent application, Lord Willes issued a writ of *habeas corpus*, ordering the custody of Rear-Admiral Mayne and Captain Rentone, two of the members of Frye's military court. *Id.* They were arrested just as they adjourned from another court-martial. *Id.* The members of the court-martial, taking great umbrage over the arrests, drafted strong resolutions about the incident, and forwarded them to the Admiralty to be given to the King. *Id.* The resolutions were apparently somewhat less than complementary towards Lord Willes, for when he found out about them, he had the entire court-martial arrested. *Id.* at 269-70, 438. Only after the members submitted the following letter of apology did Lord Willes stop the legal processes he had begun:

As nothing is more becoming a gentleman, than to acknowledge himself to be wrong, so soon as he is sensible he is so, and to make satisfaction to any person he has injured; we, therefore, whose names are underwritten, being thoroughly convinced that we were entirely mistaken in the opinion we had conceived of Lord Chief Justice Willes, think ourselves obliged in honour, as well as justice, to make him satisfaction as far as it is in our power. And, as the injury we did him was of a public nature, we do, in this public manner, declare, that we are now satisfied the reflections cast upon him in our resolutions of the 16th and 21st of May last, were unjust, unwarrantable, and without any foundation whatsoever; and we do ask pardon of his lordship, and of the Court of Common Pleas, for the indignity offered both to him and the Court.

*Id.* at 439. The letter was ordered to be registered in the Remembrance Office—as a memorial. Lord Willes accepted the apology with the observation: "To the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken." *Id.*

Finally, it should be noted that the common law courts of England were quick to sustain damages actions against officials who abused their power or held themselves above the law. See, e.g., *Rafael v. Verelst*, 96 Eng. Rep. 621 (K.B. 1776) (action for trespass sustained against President of Bengal under East India Company who procured, by awe and fear, the Nabob of Oud to imprison plaintiff); *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) (affirming verdict for plaintiff in claim for damages for false imprisonment and trespass against the Governor of Minorca; the court rejected the defendant's contention that his power was absolute and not subject to the law). In the military setting, however, an interesting line of cases developed based on dicta in *Johnstone v. Sutton*, 99 Eng. Rep. 1215 (1786). In *Sutton*, both Lord Mansfield and Lord Loughborough opined that to permit a soldier to sue his commander for disciplinary action taken in the heat of battle would seriously impair discipline in the armed forces. *Id.* at 1246. Thus, both judges believed such actions ought not be allowed; however, they based their ultimate decision in the case on other grounds. *Id.* A member of subsequent decisions followed the dicta in *Sutton*, and dismissed lawsuits by soldiers against their superiors for damages resulting from disciplinary actions. See, e.g., *Dawkins v. Paulet*, 9 B. & S. 768 (Q.B. 1869); *Dawkins v. Rokeby*, 176 Eng. Rep. 800 (C.P. 1866); *Keighly v. Bell*, 176 Eng. Rep. 781 (C.P. 1866); *Freer v. Marshall*, 176 Eng. Rep. 657 (C.P. 1865). But see *Warden v. Bailey*, 128 Eng. Rep. 253 (C.P. 1811) (Mansfield, C.J.) (action permitted). The arguments mustered on both sides of the issue are remarkably similar to those raised in current cases concerning the amenability of commanders to lawsuits brought against them by their subordinates. See, e.g., *Chappell v. Wallace*, 103 S.Ct. 2362 (1983).

Thus, when the United States declared its independence from Great Britain, it had a ready-made military justice system as well as rules defining the relationship of that system to the civilian courts.

## **B. COLLATERAL REVIEW BEFORE WORLD WAR II: A QUESTION OF JURISDICTION**

During the "colonial dependency," the power to raise and support armies and navies, and to provide for their discipline was solely with Great Britain; British forces in the colonies were subject only to English law.<sup>79</sup> It is not surprising then that, at the outset of the War for Independence, the colonies turned to the British military justice system as a model for their own.<sup>80</sup>

America's first military code, the Massachusetts Articles of War, was adopted in April 1775.<sup>81</sup> The Massachusetts code was copied from the British Articles of War of 1774.<sup>82</sup> Two months later, on June 14, 1775, the Second Continental Congress appointed a committee to draft a military code.<sup>83</sup> On June 28th, the committee reported its proposed code, which was adopted on June 30th by the Congress.<sup>84</sup> The Articles of War thus enacted were copied from the British articles of 1774 and the Massachusetts code of the previous April.<sup>85</sup> The Articles of War were revised in September 1776, and continued in force, with some amendments, until 1806.<sup>86</sup>

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<sup>79</sup>United States v. Mackenzie, 30 F. Cas. 1160, 1163 (S.D.N.Y. n.d.) (No. 18,313).

<sup>80</sup>W. Winthrop, *supra* note 34, at 22; Schlueter, *supra* note 34, at 144-45. There are few reported cases from the colonial era dealing with military disciplinary matters. One which was reported, *Draper v. Bicknell*, Quincy (Mass.) 164 (1765), involved a suit against a member of the colonial militia who failed to appear at a muster for the purpose of providing men to serve in the war against France. The court entered judgment for the plaintiff, holding that every man is obligated to attend muster on warning, unless legally exempted, and if he fails to do so, he must bear the consequences.

<sup>81</sup>W. Winthrop, *supra* note 34, at 22; Schlueter, *supra* note 34, at 145-46.

<sup>82</sup>Schlueter, *supra* note 34, at 145.

<sup>83</sup>W. Winthrop, *supra* note 34, at 22; Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15, 17 (1949); Henderson, *supra* note 28, at 297-98. The members of the committee were George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. W. Winthrop, *supra* note 33, at 22.

<sup>84</sup>W. Winthrop, *supra* note 34, at 22; Fratcher, *supra* note 83, at 17; Henderson, *supra* note 28, at 298.

<sup>85</sup>W. Winthrop, *supra* note 34, at 22; Fratcher, *supra* note 83, at 17; Schlueter, *supra* note 34, at 147.

<sup>86</sup>W. Winthrop, *supra* note 34, at 22-23. The revised Articles of 1776 were enacted over the vigorous opposition of some members of Congress who apparently preferred something more like a common law system of justice. Fratcher, *supra* note 83, at 18-19.



There was little reported interaction between the civilian courts of the Revolution and military tribunals. Ironically, in one of the few reported cases, *Government v. McGregory*,<sup>87</sup> British prisoners of war, who were indicted by the Commonwealth of Massachusetts for murder, demanded trial by court-martial. The defendants argued that the municipal courts of the state had no jurisdiction over them since, as enemy aliens, they owed no allegiance to the state or to its laws. The court, relying on English precedent, rejected the defendants' demand.

In 1777, the Articles of Confederation gave Congress the "exclusive right and power of . . . making rules for the government and regulation of the . . . land and naval forces . . ."<sup>88</sup> The Constitution's framers similarly provided Congress the power to "make rules for the Government and Regulation of the land and naval Forces."<sup>89</sup> Entrusting Congress with this authority was significant for two reasons. First, "much of the political-military power struggle, which typified so much of the early history of the British court-martial system," was avoided.<sup>90</sup> Second, it made courts-martial independent of the federal judiciary created by Article III of the Constitution.<sup>91</sup> Federal court review of court-martial proceedings would, therefore, be collateral, rather than direct, in nature.<sup>92</sup>

Following the adoption of the Constitution, on September 29, 1789, the First Congress reenacted the Articles of War of 1776.<sup>93</sup> Five days earlier, the Congress had passed the Judiciary Act of 1789 "which empowered federal courts to issue writs of habeas corpus to prisoners 'in custody under or by colour of the authority of the United States . . .'"<sup>94</sup> This tool was to be the principal means by which federal courts reviewed the judgments of military tribunals.

<sup>87</sup>14 Mass. 499 (1780).

<sup>88</sup>U.S. Arts of Confed. art. IX, para. 4 (1777), quoted in Henderson, *supra* note 28, at 298.

<sup>89</sup>U.S. Const. art. I, § 8, cl. 14.

<sup>90</sup>Schlueter, *supra* note 34, at 149. See also W. Winthrop, *supra* note 34, at 21.

<sup>91</sup>See note 27, *supra*. See generally W. Winthrop, *supra* note 34, at 49-50.

<sup>92</sup>See, e.g., Schlesinger v. Councilman, 420 U.S. 738, 746 (1975); Burns v. Wilson, 346 U.S. 137, 139-40 (1953); Wales v. Whitney, 114 U.S. 564, 570 (1885); *Ex parte Reed*, 100 U.S. 13, 23 (1879).

<sup>93</sup>Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96. See Fratcher, *supra* note 83, at 20; Weiner, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 8 (1958); Schlueter, *supra* note 34, at 149. Colonel Winthrop notes that, since the First Congress did not originally create the court-martial by its act of 1789, but merely continued its existence as previously established, the court-martial is "in fact older than the Constitution, and, therefore, older than any court of the United States instituted or authorized by that instrument." W. Winthrop, *supra* note 34, at 47-48.

<sup>94</sup>*Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1045, quoting Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

### 1. Collateral Review Before the Civil War

Before the Civil War, there were few collateral challenges in the federal courts to military court proceedings. In fact, it was not until 1879 that the Supreme Court received its first case involving a petition for habeas relief from a court-martial sentence.<sup>96</sup> In an early decision not involving military proceedings, however, the Court presaged the scope of review it would employ by declaring that the substantive principles governing the writ of habeas corpus would be those established by the common law.<sup>97</sup> Thus, review was to be limited to questions of jurisdiction.<sup>97</sup>

The earliest collateral attacks on courts-martial to reach the Supreme Court came in the form of lawsuits to recover damages or property. Pre-Civil War review was marked by a trilogy of Supreme Court decisions. In *Wise v. Withers*,<sup>98</sup> the Court reversed a judgment dismissing a trespass action arising from the execution of a fine imposed by a court-martial against the plaintiff for his failure to report for militia duty in the District of Columbia. The plaintiff, claiming he was exempt from militia duty because he was a United States justice of the peace, sued the officer who executed the fine by entering his house and taking his property. Chief Justice Marshall, writing for the Court, declared that the plaintiff, as an officer of the United States, was statutorily exempt from militia duty<sup>99</sup> and that the court-martial therefore lacked jurisdiction over him.<sup>100</sup> Consequently, the sentence of the military tribunal was void, and the officer who executed it was a trespasser.<sup>101</sup>

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<sup>96</sup>*Ex parte Reed*, 100 U.S. 13 (1879). During and immediately following the Civil War the Supreme Court heard two cases involving habeas petitions from the judgments of military commissions. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Vallandigham* 68 U.S. (1 Wall.) 243 (1864). A number of lower federal courts also reviewed habeas petitions challenging the sentences of military commissions during this period. See, e.g., *In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (No. 4,303); *Ex parte Hewitt*, 12 F. Cas. 73 (S.D. Miss. 1869) (No. 6,442); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9,899).

<sup>97</sup>*Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807).

<sup>98</sup>*Ex parte Parks*, 93 U.S. 18, 22-23 (1876); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830). See also note 67 *supra*. See generally *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1045-46.

<sup>99</sup>7 U.S. (3 Cranch) 331 (1806).

<sup>100</sup>*Id.* at 336-37.

<sup>101</sup>*Id.* at 337.

<sup>102</sup>*Id.* Chief Justice Marshall's decision was consistent with contemporary law in England. See *supra* note 78 and accompanying text.



In *Martin v. Mott*,<sup>102</sup> decided 21 years after *Withers*, the Court reversed the judgment of the New York state courts in favor of a plaintiff in an action for replevin to recover property levied for a fine adjudged by a general court-martial. The plaintiff, Mott, had failed to report to the militia when it was called into federal service during the War of 1812. He contested the validity of the court-martial's sentence on a number of grounds, both jurisdictional and procedural. The Supreme Court, in a decision by Justice Story, reviewed in depth the plaintiff's jurisdictional assertions;<sup>103</sup> however, the Court refused to review those issues which merely constituted matters of defense before the court-martial, holding that, once it was determined the court-martial had jurisdiction, its judgment was conclusive.<sup>104</sup>

Finally, in *Dynes v. Hoover*,<sup>105</sup> the Court articulated a standard of review which was to survive, in varying forms, until World War II. Dynes, a former sailor, brought an action for damages for trespass and false imprisonment against Hoover, the United States Marshal for the District of Columbia. Dynes, who had been charged with desertion and convicted of attempted desertion, was sentenced to be

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<sup>102</sup>25 U.S. (12 Wheat.) 19 (1827). Seven years earlier, in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), the Court affirmed the judgment of the Pennsylvania Supreme Court, *Moore v. Houston*, 3 Serg. & Rawle (Pa.) 169 (1817), holding that no action for trespass would lie against a deputy marshal who executed the sentence of a court-martial of competent jurisdiction. The issue involved was the power of state courts-martial to enforce federal law governing the mustering of the militia for federal service during the War of 1812. The decision's importance lies in its discussion of the interrelationship of the federal and state governments with respect to the militia. The case played an important role in the debates on the National Defense Act of 1916, which, in essence, was the conception of the modern-day National Guard. See, e.g., *National Defense Act of 1916: Hearings on H.R. 12766 Before the House Comm. on Military Affairs*, 64th Cong., 1st Sess. 717 (1916) (testimony of Brigadier General Enoch Crowder, The Judge Advocate General of the Army).

Several damages actions also reached the lower federal courts during the early 19th century. In *Slade v. Minor*, 22 F. Cas. 317 (C.C.D.D.C. 1817) (No. 12,937), the court rendered a verdict of \$56.00 for a plaintiff against a United States deputy marshal who levied on plaintiff's property to satisfy a fine imposed by a battalion court of inquiry for the plaintiff's failure to report for militia duty. The plaintiff, an alien, was deemed not subject to militia duty or to the jurisdiction of the military court. *Id.* at 318. Importantly, the court noted:

It was only necessary for the defendant, in his justification, to prove those facts which gave the battalion court of inquiry jurisdiction and which showed that the tribunal was regularly constituted; and that having shown this, the acts of that court were to be presumed correct, and that it was not competent for the plaintiff to show their irregularity.

*Id.* at 317-18. See also *Ryan v. Ringgold*, 21 F. Cas. 114 (C.C.D.D.C. 1826) (No. 12,187).

<sup>103</sup>*Martin v. Mott*, 25 U.S. (12 Wheat.), at 30-38.

<sup>104</sup>*Id.* at 38.

<sup>105</sup>64 U.S. (20 How.) 65 (1858).

confined at hard labor for six months without pay.<sup>106</sup> Hoover executed the sentence of the court-martial. Dynes challenged the jurisdiction of the military court to enter a finding of guilt for attempted desertion when he had in fact been charged with desertion. The Supreme Court acknowledged the existence of a damages action in situations in which a service member is imprisoned by a court-martial acting without jurisdiction,<sup>107</sup> but the Court held that where the military tribunal had jurisdiction and acted in accordance with its prescribed rules, its judgment could not be reviewed by the civil courts:

With the sentences of courts-martial which have been convened regularly and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrates or the civil courts.<sup>108</sup>

The Court defined jurisdictional violations of the rules and proceedings of courts-martial to be more than mere irregularities in practice or mistaken evidentiary or legal rulings; rather, they were held to entail "a disregard of the essentials required by the Statute under which the court has been convened, to try and punish an offender for an imputed violation of the law."<sup>109</sup> The Court found that Dynes' court-martial had jurisdiction over the offense of which he

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<sup>106</sup>*Id.* at 77.

<sup>107</sup>*Id.* at 80-81.

<sup>108</sup>*Id.* at 82.

<sup>109</sup>*Id.*

was convicted, and affirmed the decision of the lower court dismissing his lawsuit.<sup>110</sup>

Although no habeas petitions from military convictions reached the Supreme Court before the Civil War, a few were reported in the lower federal courts. In one of the earliest, *Meade v. Deputy Marshal*,<sup>111</sup> Chief Justice Marshall, sitting as a circuit justice, granted a petition for habeas corpus filed by a state militia man imprisoned for failing to pay a fine adjudged by a court-martial. The petitioner had been convicted of neglecting to report for duty during the War of 1812. Without articulating any basis for review, Chief Justice Marshall found that the court-martial had failed to comply with state law<sup>112</sup> and had proceeded without any notice to the petitioner.<sup>113</sup> Consequently, he considered the sentence to be unlawful and entirely nugatory.<sup>114</sup> In *In re Biddle*,<sup>115</sup> the court adopted a more structured approach, holding that it could not review alleged errors in the

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<sup>110</sup>*Id.* at 83-84. See also *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1849), *after remand*, 53 U.S. (12 How.) 390 (1851) (liability of commander of surveying expedition to marine for imposition of "nonjudicial" disciplinary sanctions).

The continued efficacy of the pre-Civil War Supreme Court decisions dealing with the liability of various public officials for acts done in pursuance of court-martial judgments is doubtful in light of subsequently developed Supreme Court doctrines of immunity. See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978) (immunity of quasi-judicial officials from constitutional torts); *Barr v. Matteo*, 360 U.S. 564 (1959) (immunity of public officials from common law torts); *Spalding v. Vilas*, 161 U.S. 483 (1896) (immunity from common law torts); *Kendall v. Stokes*, 44 U.S. (3 How.) 97 (1845) (immunity from common law torts); *Pullan v. Kissinger*, 20 F. Cas. 44 (S.D. Ohio 1870) (No. 11,463) (questions continued vitality of *Wise v. Withers*). See also cases which have extended the immunity of *Feres v. United States*, 340 U.S. 135 (1950), to suits between service members: *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982); *Calhoun v. United States*, 604 F.2d 647 (9th Cir. 1979), *aff'd* 475 F. Supp. 1 (S.D. Cal. 1977), *cert. denied*, 444 U.S. 1078 (1980); *Martinez v. Schrock*, 537 F.2d 765 (3d Cir. 1976) (en banc); *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975); *Rotko v. Abrams*, 455 F.2d 992 (2d Cir. 1972); *aff'd* 338 F. Supp. 46 (D. Conn. 1971); *Sigler v. LeVan*, 485 F. Supp. 185 (D. Md. 1980); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979); *Birdwell v. Schlesinger*, 403 F. Supp. 710 (D. Colo. 1975). Cf. *Chappell v. Wallace*, 103 S. Ct. 2362 (1983); *Mollnow v. Carlton*, 716 F.2d 627 (9th Cir. 1983); *Gaspard v. United States*, 713 F.2d 586 (5th Cir. 1983); *Bishop v. United States*, 574 F. Supp. 66 (D.D.C. 1983); *Presson v. Slayden*, 570 F. Supp. 842 (N.D. Ga. 1983) (cases holding service members cannot sue their superiors for damages for constitutional or common law torts).

<sup>111</sup>16 F. Cas. 1291 (C.C.D. Va. 1815)(No. 9,372).

<sup>112</sup>*Id.* at 1293.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>30 F. Cas. 965 (C.C.D.D.C. 1855)(No. 18236).

courts-martial of four habeas petitioners once it found the military courts had jurisdiction.<sup>116</sup>

Surprisingly, most of the case law developed during the first half of the nineteenth century arose in the state courts. As in the federal courts, many of the early cases were damages actions against both state and federal officials. For example, in *Loomis v. Simons*,<sup>117</sup> the Connecticut Supreme Court dismissed a lawsuit for trespass and false imprisonment filed by a militia man jailed for neglecting to pay a fine imposed for his failure to appear for duty. In language similar to the contemporary English cases, the court stated:

All the jurisdiction of the Superior Court spreads over the state and over all other courts of peculiar jurisdiction, to superintend them, and to keep them within their proper limits and bounds, to prevent their interfering with one another or their encroaching on the common-law courts. But hath no right to interfere in any causes or questions proper for the other courts to determine.<sup>118</sup>

Most other state courts similarly limited recovery to instances in

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<sup>116</sup>*Id.* Cf. *United States v. Mackenzie*, 26 F. Cas. 118 (S.D.N.Y. 1843)(No. 15,690), in which the widow of a sailor, Samuel Cromwell, sought a warrant for the arrest of Commander Alexander Slidell Mackenzie and Lieutenant Guert Gansevoort, officers of the United States brig "Somers," for allegedly murdering her husband. Apparently, Mackenzie and Gansevoort hung Cromwell, fearing he was part of a mutinous conspiracy. The district court, noting that the purported crime was, at the time, the subject of a naval court of inquiry, refused to issue the warrant:

It would be most unusual, if not indiscreet, while the head of the government is pursuing this investigation in respect to the conduct of the officers of the Navy in the exercise of their command, for a single magistrate to intervene, and by his warrant to change the whole course of proceedings, and attempt to establish paramount jurisdiction in himself over a case where at least there is a color of authority to support the method pursued by the government.

*Id.* at 51. For later proceedings, see *United States v. Mackenzie*, 30 F. Cas. 1160 (S.D.N.Y. n.d.)(No. 18,313). The *Mackenzie* case was also the subject of a civil lawsuit, *Wilson v. Mackenzie*, 7 Hill (N.Y.) 95 (Sup. Ct. 1845), and the basis of Herman Melville's novel, *Billy Budd*. D. Wallechinsky & I. Wallace, *The People's Almanac* 639 (1975).

<sup>117</sup>2 Root (Conn.) 454 (1796).

<sup>118</sup>*Id.* at 456.

which the plaintiff was punished by a military court without jurisdiction.<sup>119</sup>

Moreover, until 1871, state civil courts exercised habeas corpus jurisdiction, not only in cases involving collateral challenges to state courts-martial,<sup>120</sup> but challenges to federal military custody as well. The first reported instance of a soldier seeking his release from federal custody in the state courts was *Husted's Case*,<sup>121</sup> decided in 1799. While the court denied the petition on its merits, only one of the five judges doubted the jurisdiction of the state court to hear the petition.<sup>122</sup> Thereafter, an increasing number of petitions were filed in the state courts,<sup>123</sup> perhaps explaining, at least in part, the dearth of habeas cases in the federal courts before the Civil War. Although a few early decisions questioned the jurisdiction of the state courts to issue such writs, by the 1820s, the question clearly had been settled in favor of the jurisdiction of state courts.<sup>124</sup>

<sup>119</sup>See, e.g., *Merriman v. Bryant*, 14 Conn. 200 (1841); *Hickey v. Huse*, 56 Me. 493 (1869); *Rathburn v. Martin*, 20 Johns. (N.Y.) 343 (1823); *Mills v. Martin*, 19 Johns. (N.Y.) 7 (1821); *Wilbur v. Grace*, 12 Johns. (N.Y.) 68 (1814); *Vanderheyden v. Young*, 11 Johns. (N.Y.) 150 (1814); *Moore v. Houston*, 3 Serg. & Rawle (Pa.) 169 (1817), *aff'd*, 18 U.S. (5 Wheat.) 1 (1820); *Duffield v. Smith*, 3 Serg. & Rawle (Pa.) 590 (1818); *Barrrett v. Crane*, 16 Vt. 246 (1844); *Brown v. Wadsworth*, 15 Vt. 170 (1843). Cf. *Schuneman v. Diblee*, 14 Johns. (N.Y.) 235 (1817) (suit for damages for "nonjudicial" disciplinary action); *Smith v. Shaw*, 12 Johns. (N.Y.) 257 (1815) (suit by civilian for arrest and detention by military authorities). But see *Van Orsdall v. Hazard*, 3 Hill (N.Y.) 243 (Sup. Ct. 1842) (court looked at merits of plaintiff's claim before dismissing suit).

<sup>120</sup>See, e.g., *In re Bolton*, 3 Serg. & Rawle (Pa.) 176 (1815).

<sup>121</sup>1 Johns. Cas. (N.Y.) 136 (1799).

<sup>122</sup>*Id.*

<sup>123</sup>See *In re Reynolds*, 20 F. Cas. 592 (N.D.N.Y. 1867) (No. 11,721) (summary of state cases).

<sup>124</sup>For example, in *The Matter of Ferguson*, 9 Johns. (N.Y.) 239 (1812), a decision by Chief Justice Kent, the court held that it lacked jurisdiction to grant habeas relief to the parents of a minor who enlisted in the United States Army without their consent. Kent wrote that it was the responsibility of federal, not state, courts to supply such relief: "Numberless cases may be supposed of the abuse of power, by the civil and military officers of the government of the United States; but the courts of the United States have competent authority to correct all such abuses, and they are bound to exercise that authority. The responsibility is with them, not with us . . ." *Id.* at 240 (emphasis in original).

The *Ferguson* decision was undercut the following year when the same court, in a decision also written by Kent, granted habeas relief to a civilian held by federal troops for suspected treasonable practices in carrying provisions and information to the British. In *The Matter of Stacy*, 10 Johns. (N.Y.) 328 (1813). In 1827, the issue was definitely settled in favor of jurisdiction:

We have jurisdiction, unless it has been expressly surrendered or taken away. Any person illegally detained, has a right to be discharged, and it is the duty of this court to restore him to his liberty. No act of congress, or of this state, has forbidden the exercise of this common law jurisdiction. It ought, therefore, to be applied.

In *The Matter of Carlton*, 7 Cow. (N.Y.) 471-72 (1827). See also *State v. Dimick*, 12 N.H. 197 (1841); *Commonwealth ex rel. Webster v. Fox*, 7 Pa. 336 (1847).

The only issue entertained on habeas petitions to the state courts was jurisdiction on the theory that, if a federal officer, *without jurisdiction*, held a citizen in custody, the state court would not encroach on the *lawful* authority of the federal government by granting the writ.<sup>125</sup> Most of the cases appear to have involved applications for the release of minors, who had enlisted without their parents' consent, and who subsequently committed and were charged with court-martial offenses.<sup>126</sup>

The beginning of the end of state habeas jurisdiction over members of the armed forces came with the case of *Ableman v. Booth*,<sup>127</sup> in which the Supreme Court held that the Wisconsin courts had no jurisdiction to release from custody a prisoner confined by the United States District Court for violating the Fugitive Slave Act.<sup>128</sup> For the next eleven years, however, state courts continued to enter-

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<sup>125</sup> . . . here the question is not one of disregard or burdening any rightful authority of the United States. It is a question merely of deciding, in the first instance, in the exercise of the ordinary jurisdiction of the state tribunals to protect the liberty of the citizen, whether any person, claiming to hold him under federal authority, has shown a valid authority.

*In re Tarble*, 25 Wis. 390, 410 (1870), *rev'd*, 80 U.S. (13 Wall.) 397 (1871). See also *In re Reynolds*, 20 F. Cas. 592, 607 (N.D.N.Y. 1867) (No. 11,721).

<sup>126</sup>See, e.g., *Ex parte Anderson*, 16 Iowa 595 (1864); *In the Matter of Beswick*, 25 How. Pr. (N.Y.) 149 (Sup. Ct. 1863); *In the Matter of Carlton*, 7 Cow. (N.Y.) 471 (1827); *In the Matter of Graham*, 53 N.C. (8 Jones) 416 (1861); *McConologue's Case*, 107 Mass. 154 (1871); *Commonwealth v. Cushing*, 11 Mass. 67 (1814); *Commonwealth v. Chandler*, 11 Mass. 83 (1814); *Commonwealth v. Harrison*, 11 Mass. 63 (1814); *Commonwealth ex rel. Webster v. Fox*, 7 Pa. 336 (1847); *Commonwealth v. Gamble*, 11 Serg. & Rawle (Pa.) 93 (1824); *In re Tarble*, 25 Wis. 390 (1870), *rev'd*, 80 U.S. (13 Wall.) 397 (1871).

<sup>127</sup>62 U.S. (21 How.) 506 (1858).

<sup>128</sup>*Booth* was a bitter case decided in the days just before the Civil War. See *In re Reynolds*, 20 F. Cas. at 601-05. Booth was arrested and confined by the United States Marshal pursuant to an order of a commissioner of the United States District Court for Wisconsin, for aiding and abetting the escape of a fugitive slave in violation of the Fugitive Slave Act. On Booth's application, the Wisconsin Supreme Court ordered his release on the ground the Fugitive Slave Act was unconstitutional. Booth was subsequently tried and convicted by the district court for violating the Act, and sentenced to one month's confinement and a \$1,000 fine. The Wisconsin Supreme Court again ordered his release. Moreover, when the Attorney General filed a writ of error to the United States Supreme Court, the Wisconsin court ordered its clerk "to make no return to the writ of error, and to enter no order upon the journal or records of the court concerning the same." *Ableman v. Booth*, 62 U.S. (21 How.), at 512 (emphasis in original). Thus, in effect, the Wisconsin court directed its clerk to disobey the Supreme Court by withholding the record of the state court proceedings. The Attorney General was forced to file his copy of the record with the Supreme Court. The United States Supreme Court, expressing obvious displeasure with actions of the Wisconsin court, held that when it appears a petitioner for habeas corpus is in custody under the authority of the United States, a state court may proceed no further in the case. *Id.* at 523-24.



tain petitions for writs of habeas corpus filed by military prisoners, either by narrowly construing *Booth* to apply only to prisoners held under color of federal judicial process,<sup>129</sup> or by refusing to follow *Booth* altogether.<sup>130</sup> The end came in 1871 with *Tarble's Case*,<sup>131</sup> in which the Supreme Court plainly held that state courts had no jurisdiction to grant habeas relief to petitioners in the custody of the United States military.<sup>132</sup>

Finally, because the states were not bound by the constitutional separation of the military and civil judicial systems, state civil courts were able to review the proceedings of state military tribunals through a diversity of procedural mechanisms, including prohibition,<sup>133</sup> certiorari,<sup>134</sup> appeal,<sup>135</sup> enforcement of court-martial fines,<sup>136</sup> and actions to recover fines imposed.<sup>137</sup> Review was generally

<sup>129</sup>See, e.g., *In re Reynolds*, 20 F. Cas. at 601-07; McDonologue's Case, 107 Mass. 154, 167 (1871).

<sup>130</sup>*In re Tarble*, 25 Wis. 390 (1870), *rev'd*, 80 U.S.(13 Wall.) 397 (1871). The Wisconsin Supreme Court, apparently still miffed by the decision in *Booth*, rejected the approach taken by those courts that attempted to limit *Booth* to cases of custody under process issued by a United States court. In *Tarble*, the Wisconsin court believed *Booth* misinterpreted the law and refused to follow it.

<sup>131</sup>80 U.S.(13 Wall.) 397 (1871).

<sup>132</sup>*Tarble* involved a habeas petition by the father of a minor who had enlisted in the Army without consent. The service member was being held for court-martial on charges of desertion when the petition was filed. The state court granted the petition, see note 130 *supra*. The Supreme Court reversed, reaffirmed its decision in *Booth*, and held that once a state court finds that a habeas applicant is being held by an officer of the United States, it can proceed no further. The Court declared that it was the responsibility of the federal, not the state, courts to grant relief. *Tarble's Case*, 80 U.S.(13 Wall.) at 409-11.

<sup>133</sup>E.g., *Ex parte Biggers*, 26 S.C.L. (1 McM.) 69 (1840); *State v. Stevens*, 13 S.C.L. (2 McCord.) 32 (1822); *State v. Wakely*, 11 S.C.L. (2 Nott & McC.) 412 (1820).

<sup>134</sup>E.g., *State v. Plume*, 44 N.J.L. 362 (1882); *People ex rel. Garling v. Van Allen*, 55 N.Y. 31 (1873); *People ex rel. Underwood v. Daniell*, 50 N.Y. 274 (1872); *People ex rel. Spahn v. Townsend*, 10 Abb. N. Cas. (N.Y.) 169 (Sup. Ct. 1880). But see *Ex parte Dunbar*, 14 Mass. 393 (1817) (certiorari not available to review judgment of court-martial).

<sup>135</sup>E.g., *Durham v. State*, 5 Tenn. (4 Hayw.) 54 (1817).

<sup>136</sup>E.g., *Nowlin v. McCalley*, 31 Ala. 678 (1858); *Crawford v. Howard*, 30 Me. 422 (1849); *Alden v. Fitts*, 25 Me. 488 (1845); *Brooks v. Daniels*, 39 Mass. (22 Pick.) 498 (1839); *Brooks v. Davis*, 34 Mass. (17 Pick.) 148 (1835); *Brooks v. Graham*, 28 Mass. (11 Pick.) 445 (1831); *Brooks v. Adams*, 28 Mass. (11 Pick.) 441 (1831); *Coffin v. Wilbur*, 24 Mass. (7 Pick.) 148 (1828).

<sup>137</sup>E.g., *Porter v. Wainwright*, 32 Mass. (15 Pick.) 439 (1834); *Vanderbilt v. Downing*, 11 Johns. (N.Y.) 83 (1814); *Capron v. Austin*, 7 Johns. (N.Y.) 96 (1810).

limited to questions of technical jurisdiction;<sup>138</sup> most state courts were not willing, however, to raise any presumptions in favor of court-martial jurisdiction, and strictly construed the statutes governing their existence.<sup>139</sup>

## 2. Collateral Review from the Civil War to World War II.

With the Civil War, the number of collateral challenges to the proceedings of military tribunals filed in the federal courts increased dramatically. This increase is attributable to a number of factors, including the rapid growth of the military during the war, the expansion of offenses cognizable by courts-martial,<sup>140</sup> the creation in 1855 of the Court of Claims,<sup>141</sup> and the demise of the state courts as a forum for habeas relief.<sup>142</sup> Growth, however, did not mean change. The federal courts still were limited to collateral forms of review,<sup>143</sup>

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<sup>138</sup>E.g., *Nowlin v. McCalley*, 31 Ala. 678 (1858) (lack of subject-matter jurisdiction); *Crawford v. Howard*, 30 Me. 422 (1849) (jurisdiction of court-martial must be reviewed); *Brooks v. Daniels*, 39 Mass. (22 Pick.) 498 (1839) (improper membership); *Brooks v. Davis*, 34 Mass. (17 Pick.) 148 (1835) (improper membership); *Porter v. Wainwright*, 32 Mass. (15 Pick.) 439 (1834) (court convened by officer without authority); *Brooks v. Adams*, 28 Mass. (11 Pick.) 441 (1831) (judge advocate of court improperly appointed); *Capron v. Austin*, 7 Johns. (N.Y.) 96 (1810) (accused not notified of proceedings); *People ex rel. Spahn v. Townsend*, 10 Abb. N. Cas. (N.Y.) 169 (Sup. Ct. 1880) (lack of subject-matter jurisdiction); *Durham v. United States*, 5 Tenn. (4 Hayw.) 54 (1817) (accused not notified of proceedings). *But cf.* *Coffin v. Wilbur*, 24 Mass. (7 Pick.) 148 (1828) (court remanded case for rehearing on both jurisdictional and procedural errors in court-martial).

One notable exception to this limited inquiry stands out. In *People ex rel. Garling v. Van Allen*, 55 N.Y. 31 (1873), the New York Court of Appeals reversed the judgment of a court-martial that had denied the accused's counsel the right to participate in the proceedings. Under the New York Constitution, criminal defendants were entitled to counsel in all court proceedings. The Court of Appeals held that courts-martial were courts and, therefore, it was reversible error to prevent the accused's counsel from representing the accused during his court-martial.

<sup>139</sup>See, e.g., *Brooks v. Adams*, 28 Mass. (11 Pick.) 441, 442 (1831) ("A court-martial is a court of limited and special jurisdiction. . . . The law will intend nothing in its favor").

<sup>140</sup>See *O'Callahan v. Parker*, 395 U.S. 258, 271 (1969); *Weiner*, *supra* note 93, at 12.

<sup>141</sup>Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. The Court of Claims offered a new means of collateral attack on court-martial sentences, back pay actions.

<sup>142</sup>*Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871); *Ableman v. Booth*, 62 U.S. (21 How.) 596 (1858).

<sup>143</sup>See, e.g., *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864) (court refused to review by certiorari the judgment of a military commission).



which meant a search for jurisdiction and nothing more.<sup>144</sup>

In 1879, the first habeas attack on a court-martial conviction, *Ex parte Reed*,<sup>145</sup> reached the Supreme Court. The petitioner, a Navy paymaster's clerk, was tried on charges of malfeasance by a general court-martial convened aboard the United States ship *Essex*, then stationed at Rio de Janeiro, Brazil. The military court found the petitioner guilty and assessed a sentence. The convening authority, Rear Admiral Edward F. Nichols, the commander of the U.S. Naval Force of the South Atlantic Station, was unhappy with the sentence adjudged and declined to approve it. Instead, he sent the proceedings back to the court for revision of the sentence. The court-martial reconvened and assessed a harsher punishment, which Admiral Nichols approved. The petitioner challenged the sentence while serving his confinement aboard a naval vessel in Boston Harbor. He claimed that, as a paymaster's clerk, he was a civilian and not subject to court-martial, and that the sentence was unlawful because of the manner in which it was revised after first assessed. The Circuit Court for the District of Massachusetts rejected the petitioner's claims on their merits.<sup>146</sup>

On appeal, the Supreme Court affirmed.<sup>147</sup> It also reviewed and rejected the merits of the petitioner's claims.<sup>148</sup> More importantly, it pronounced a standard of review, which was to be applied to habeas attacks on court-martial sentences for well over half a century:

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<sup>144</sup>See, e.g., *In re Corbett*, 6 F. Cas. 527 (E.D.N.Y. 1877) (No. 3,219); *In re Bird*, 3 F. Cas. 425 (D. Ore. 1871) (No. 1,428); *In re Thomas*, 23 F. Cas. 931 (N.D. Miss. 1869) (No. 13,888). The courts were not reluctant, however, to overturn the convictions of military tribunals that exceeded their jurisdiction, especially those which attempted to exercise jurisdiction over civilians. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (military commission); *Ex parte Henderson*, 11 F. Cas. 1067 (C.C.D. Ky. 1878) (No. 6,348) (court-martial of civilian); *Milligan v. Hovey*, 17 F. Cas. 380 (C.C.D. Ind. 1871) (no. 9,605) (damages action arising out of *Milligan* case); *In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (No. 4,303) (military commission); *Ex parte Hewitt*, 12 F. Cas. 73 (S.D. Miss. 1869) (No. 6,442) (military commission). But cf. *Holmes v. Sheridan*, 12 F. Cas. 422 (C.C.D. Kan. 1870) (No. 6,644) (upholding power of court-martial to try contractor furnishing beef to Army during war with Caddo Indians).

<sup>145</sup>100 U.S. 13 (1879).

<sup>146</sup>*In re Reed*, 20 F. Cas. 408 (C.C.D. Mass. 1879) (No. 11,636).

<sup>147</sup>*Ex parte Reed*, 100 U.S. 13 (1879).

<sup>148</sup>*Id.* at 21-22. The Court found that Admiral Nichol's actions were consistent with regulations published by the Secretary of the Navy. *Id.* at 22. Further, it held that, as a paymaster's clerk, the petitioner was a member of the Navy and subject to court-martial jurisdiction. *Id.* at 21-22.

With regard to the latter issue, a number of nineteenth century cases involved the military status of paymaster's clerks. See, e.g., *Johnson v. Sayre*, 158 U.S. 109 (1895); *Ex parte Van Vranken*, 47 F. 888 (C.C.D. Va. 1891), *rev'd*, 163 U.S. 694 (1895); *In re Thomas*, 23 F. Cas. 931 (N.D. Miss. 1869) (No. 13,888); *United States v. Bogart*, 24 F. Cas. 1184 (E.D.N.Y. 1869) (No. 14,616).

The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court.<sup>149</sup>

The Court emphasized that a writ of habeas corpus could not be made to perform the functions of a writ of error, and, to warrant the discharge of a prisoner, "the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void."<sup>150</sup>

In 1883, the Supreme Court extended the limited review principles articulated in *Reed* to back pay claims in the Court of Claims.<sup>151</sup> Similarly, in 1886, relying on *Grant v. Gould*,<sup>152</sup> the Court held that writs of prohibition to enjoin the proceedings of courts-martial were "never to be issued unless it clearly appear[ed] that the . . . court [was] about to exceed its jurisdiction."<sup>153</sup>

Subsequent decisions of the Supreme Court and the lower federal courts more or less confirmed and adopted the principles enunciated

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<sup>149</sup>*Ex parte Reed*, 100 U.S. at 23.

<sup>150</sup>*Id.*

<sup>151</sup>*Keyes v. United States*, 109 U.S. 336 (1883), *aff'd* 15 Ct. Cl. 532 (1879).

<sup>152</sup>126 Eng. Rep. 434 (C.P. 1792).

<sup>153</sup>*Smith v. Whitney*, 116 U.S. 167, 176 (1886). A year earlier, in *Wales v. Whitney*, 114 U.S. 564 (1885), the Supreme Court denied habeas relief to the former Surgeon General of the Navy against whom court-martial charges were pending. Although the Court based its decision on the lack of habeas jurisdiction because of an absence of custody, *id.* at 569-72, in dicta, the Court made it clear that it would not interfere with a court-martial unless it were proceeding without jurisdiction. *Id.* at 570. *Cf.* *Kurtz v. Moffitt*, 115 U.S. 487 (1885) (court released deserter arrested by San Francisco police on ground civil authorities lacked jurisdiction to enforce military law).

in *Reed*.<sup>154</sup> Few of the decisions offered even a glimmer of hope to military prisoners confined pursuant to the sentences of courts-martial of competent jurisdiction.<sup>155</sup>

Review of the technical jurisdiction of courts-martial generally was held to consist of four different aspects. First, courts-martial were reviewable to determine whether the tribunal had jurisdiction over the offense.<sup>156</sup> Federal courts would insure that military tribunals were empowered by law to try the offenses charged,<sup>157</sup> such

<sup>154</sup>See, e.g., *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 334 (1922); *United States ex rel. French v. Weeks*, 259 U.S. 326, 335 (1922); *Collins v. McDonald*, 258 U.S. 416, 418 (1922); *Givens v. Zerst*, 255 U.S. 11 (1921); *Mullan v. United States*, 212 U.S. 516, 520 (1909); *Bishop v. United States*, 197 U.S. 334, 342-43 (1905); *Carter v. McClaughry*, 183 U.S. 365, 380-81 (1902); *Carter v. Roberts*, 177 U.S. 496, 498 (1900); *Swaim v. United States*, 165 U.S. 553, 555 (1897); *Johnson v. Sayre*, 158 U.S. 109, 118 (1895); *United States v. Fletcher*, 148 U.S. 84, 92 (1893); *United States v. Grimley*, 137 U.S. 147, 150 (1890); *Ex parte Mason*, 105 U.S. 696 (1882); *Sanford v. Robbins*, 115 F.2d 435, 437 (5th Cir.), *cert. denied*, 312 U.S. 697 (1940); *Ex parte McIntyre*, 4 F.2d 823, 824 (9th Cir. 1925); *United States v. Bullard*, 290 F. 704, 708 (2d Cir. 1923); *McRae v. Henkes*, 273 F. 108, 113 (8th Cir. 1921); *Rose ex rel. Carter v. Roberts*, 99 F. 948, 949 (2d Cir.), *cert. denied*, 176 U.S. 684 (1900); *In re Cadwallader*, 127 F. 881, 883-84 (C.C.E.D. Mo. 1904); *United States v. Maney*, 61 F. 140, 141-42 (C.C.D. Minn. 1894); *In re Zimmerman*, 30 F. 176, 177-78 (C.C.N.D. Cal. 1887); *In re Esmond*, 16 D.C. (5 Mackey) 64, 76-77 (1886); *In re Davison*, 21 F. 618, 620-21 (C.C.S.D.N.Y. 1884); *In re White*, 17 F. 723, 724-25 (C.C.D. Cal. 1883); *Barrett v. Hopkins*, 7 F. 312, 314 (C.C.D. Kan. 1881); *Ex parte Beshers*, 63 F. Supp. 997, 998 (D. Mont. 1945), *appeal dismissed sub nom. Beshers v. Weyand*, 155 F.2d 723 (9th Cir. 1946); *Ex parte Potens*, 63 F. Supp. 582, 586 (E.D. Wis. 1945); *United States ex rel. Marino v. Hildreth*, 61 F. Supp. 667, 669 (E.D.N.Y. 1945); *Hurse v. Caffey*, 59 F. Supp. 363, 365 (N.D. Tex. 1945); *In re Berue*, 54 F. Supp. 252, 254 (S.D. Ohio 1942); *In re Waidman*, 42 F.2d 239, 240 (D. Me. 1930); *Ex parte Joly*, 290 F. 858, 859-60 (S.D.N.Y. 1922); *United States ex rel. Wessels v. McDonald*, 265 F. 754, 579-60 (E.D.N.Y. 1920), *appeal dismissed*, 256 U.S. 705 (1921); *Ex parte Dostal*, 243 F. 664, 668 (N.D. Ohio 1917); *Ex parte Tucker*, 212 F. 569, 570 (D. Mass. 1913); *Ex parte Dickey*, 204 F. 322, 324-26 (D. Me. 1913); *Ex parte Townsend*, 133 F. 74, 75 (D. Neb. 1904); *In re Spencer*, 40 F. 149, 150 (D. Kan. 1889); *In re McVey*, 23 F. 878-79 (D. Cal. 1885); *Lyon v. United States*, 48 Ct. Cl. 30, 32 (1912); *Colman v. United States*, 38 Ct. Cl. 315, 337 (1903).

<sup>155</sup>*Bishop*, *supra* note 6, at 43-44. The courts, however, almost uniformly agreed that they had jurisdiction to review for jurisdiction. See *Hiatt v. Brown*, 175 F.2d 273, 275-76 (5th Cir. 1949), *rev'd on other grounds*, 339 U.S. 103 (1950); *In re Grimley*, 38 F. 84, 85 (C.C.D. Mass. 1889), *rev'd on other grounds*, 137 U.S. 147 (1890); *In re Zimmerman*, 30 F. 176, 180 (C.C.N.D. Cal. 1887); *Barrett v. Hopkins*, 7 F. 312, 314 (C.C.D. Kan. 1881). *But see Ex parte Mason*, 105 U.S. 696 (1882) (Court could not agree on whether it had any jurisdiction to collaterally review court-martial convictions on habeas corpus).

<sup>156</sup>See generally *Fletcher*, *supra* note 9, at 275; *Snedeker*, *supra* note 9, at 298-99; *Weckstein*, *supra* note 9, at 29.

<sup>157</sup>See, e.g., *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820); *Crouch v. United States*, 13 F.2d 348 (9th Cir. 1926); *Anderson v. Crawford*, 265 F. 504 (8th Cir. 1920); *Meade v. Deputy Marshal*, 16 F. Cas. 1291 (C.C.D. Va. 1815) (No. 9,372); *Ex parte Joly*, 290 F. 858 (S.D.N.Y. 1922); *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920), *appeal dismissed*, 256 U.S. 705 (1921); *United States v. Mackenzie*, 26 F. Cas. 1118 (S.D.N.Y. 1843) (No. 15,690). See also *Duffield v. Smith*, 3 Serg. & Rawle (Pa.) 590 (1818); *In re Bolton*, 3 Serg. & Rawle (Pa.) 176 (1815).

as by ascertaining whether the offense was committed in a geographic area over which the court-martial had cognizance,<sup>158</sup> or was committed in time of war,<sup>159</sup> or was tried by the proper tribunal.<sup>160</sup> Review would not extend, however, to determining whether the acts committed in fact amounted a violation of military law.<sup>161</sup> For example, the federal courts would not second-guess the judgments of courts-martial that particular behavior constituted "conduct unbecoming an officer,"<sup>162</sup> or "conduct prejudicial to good order and military discipline,"<sup>163</sup> nor would the courts review the sufficiency of either the pleadings of the offenses,<sup>164</sup> or the evidence adduced to prove their existence.<sup>165</sup>

Second, collateral challenges to the personal jurisdiction of courts-martial were subject to review by the civilian courts.<sup>166</sup> Such challenges generally consisted of claimed nonamenability to military law

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<sup>158</sup>See, e.g., *Aderhold v. Menefee*, 67 F.2d 345 (5th Cir. 1933) (question of whether offense occurred outside territorial limits of U.S.); *Rosborough v. Russell*, 150 F.2d 809 (1st Cir. 1945) (question of whether offense committed on public vessel).

<sup>159</sup>See, e.g., *Kahn v. Anderson*, 255 U.S. 1 (1921) (World War I); *Givens v. Zerbst*, 255 U.S. 11 (1921) (World War I); *Johnson v. Biddle*, 12 F.2d 366 (8th Cir. 1926) ("Pershing Expedition"); *Frazier v. Anderson*, 2 F.2d 36 (8th Cir. 1924) (World War I); *Hamilton v. McClaughry*, 136 F. 445 (C.C.D. Kan. 1905) (Boxer Rebellion). See also *Lee v. Madigan*, 358 U.S. 228 (1958) (World War II).

<sup>160</sup>See, e.g., *United States v. Waller*, 225 F. 673 (E.D. Pa. 1915) (jurisdiction of Navy court-martial over Articles of War). See also *Nowlin v. McCalley*, 31 Ala. 678 (1858).

<sup>161</sup>See, e.g., *Bishop v. United States*, 197 U.S. 334 (1905) (drunkenness of an officer); *In re McVey*, 23 F. 878 (D. Cal. 1885) (desertion); *Melvin v. United States*, 45 Ct. Cl. 213 (1910) (hazing).

<sup>162</sup>See, e.g., *United States v. Fletcher*, 148 U.S. 84 (1893); *Ex parte Joly*, 290 F. 858 (S.D.N.Y. 1922).

<sup>163</sup>See, e.g., *Swaim v. United States*, 165 U.S. 553 (1897); *Ex parte Mason*, 105 U.S. 696 (1882); *Ex parte Dickey*, 204 F. 322 (D. Me. 1913) ("scandalous conduct"); *In re Esmond*, 16 D.C. (5 Mackey) 64 (1886).

<sup>164</sup>See, e.g., *Collins v. McDonald*, 258 U.S. 416, 420 (1922) ("It is not necessary that the charge in court-martial proceedings should be framed with the technical precision of a common-law indictment"); *Johnson v. Biddle*, 12 F.2d 366 (8th Cir. 1926); *Rose ex rel. Carter v. Roberts*, 99 F. 948 (2d Cir.), *cert. denied*, 176 U.S. 684 (1900); *United States v. Maney*, 61 F. 140 (C.C.D. Minn. 1894).

<sup>165</sup>See, e.g., *Collins v. McDonald*, 258 U.S. 416 (1922); *Aderhold v. Menefee*, 67 F.2d 345 (5th Cir. 1933); *rev'd* 5 F. Supp. 102 (N.D. Ga. 1932); *Ex parte McIntyre*, 4 F.2d 823 (9th Cir. 1925); *Ex parte Potens*, 63 F. Supp. 582 (E.D. Wis. 1945); *United States ex rel. Marino v. Hildreth*, 61 F. Supp. 667 (E.D.N.Y. 1945); *Ex parte Kerekes*, 274 F. 870 (E.D. Mich. 1921); *Ex parte Foley*, 243 F. 470 (W.D. Ky. 1917); *Ex parte Dickey*, 204 F. 322 (D. Me. 1913); *In re Corbett*, 6 F. Cas. 527 (E.D.N.Y. 1877) (No. 3,217).

<sup>166</sup>See note 156 *supra*.

by civilians,<sup>167</sup> discharged military prisoners,<sup>168</sup> reservists,<sup>169</sup> deserters,<sup>170</sup> and service members held beyond the term of their enlistments.<sup>171</sup> Also subject to review were asserted defects in enlistments due to such factors as minority,<sup>172</sup> overage,<sup>173</sup> citizenship,<sup>174</sup> and desertion from previous terms of service.<sup>175</sup> During the World

<sup>167</sup>See, e.g., *Johnson v. Sayre*, 158 U.S. 109 (1895) (paymaster's clerk); *Ex parte Reed*, 100 U.S. 13 (1879) (paymaster's clerk); *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), *cert. dismissed*, 327 U.S. 777 (1946) (contractor's employee); *Anderson v. Crawford*, 265 F. 504 (8th Cir. 1920) (civilian teamster); *Ex parte Van Vranken*, 47 F. 888 (C.C.D. Va. 1891) (paymaster's clerk), *rev'd*, 163 U.S. 694 (1895); *Ex parte Henderson*, 11 F. Cas. 1067 (C.C.D. Ky. 1878) (No. 6,349) (contractor); *In re Berue*, 54 F. Supp. 752 (S.D. Ohio 1944) (merchant seaman); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943) (civilian seaman); *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y. 1943) (contractor's employee); *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920), *appeal dismissed*, 256 U.S. 705 (1921) (spy); *Ex parte Jochen*, 257 F. 200 (S.D. Tex 1919) (civilian border guard); *Ex parte Weitz*, 256 F. 58 (D. Mass. 1919) (contractor's employee); *Ex parte Falls*, 251 F. 415 (D.N.J. 1918) (cook onboard Army transport vessel); *Ex parte Gerlach*, 247 F. 616 (S.D.N.Y. 1917) (ship's mate); *Smith v. Shaw*, 12 Johns. (N.Y.) 257 (1815) (spy).

<sup>168</sup>See, e.g., *Kahn v. Anderson*, 255 U.S. 1 (1921); *Mosher v. Hunter*, 143 F.2d 745 (10th Cir. 1944), *cert. denied*, 323 U.S. 800 (1945); *In re Craig*, 70 F. 969 (C.C.D. Kan. 1895).

<sup>169</sup>See, e.g., *United States ex rel. Pasela v. Fenno*, 167 F.2d 593 (2d Cir.), *cert. denied*, 335 U.S. 806 (1948); *United States ex rel. Santantino v. Warden*, 265 F. 787 (E.D.N.Y. 1919).

<sup>170</sup>See, e.g., *Ex parte Smith*, 47 F.2d 257 (D. Me. 1931); *Ex parte Wilson*, 33 F.2d 214 (E.D. Va. 1929).

<sup>171</sup>See, e.g., *Barrett v. Hopkins*, 7 F. 312 (C.C.D. Kan. 1881); *Ex parte Clark*, 271 F. 533 (E.D.N.Y. 1921); *In re Bird*, 3 F. Cas. 425 (D. Ore. 1871) (No. 1,428).

<sup>172</sup>See, e.g., *Morrissey v. Perry*, 137 U.S. 157 (1890); *Hoskins v. Pell*, 239 F. 279 (5th Cir. 1917); *Hoskins v. Dickerson*, 239 F. 275 (5th Cir. 1917); *In re Miller*, 114 F. 838 (5th Cir. 1902); *Solomon v. Davenport*, 87 F. 318 (4th Cir. 1898); *Ex parte Rock*, 171 F. 240 (C.C.N.D. Ohio 1909); *In re Carver*, 142 F. 623 (C.C.D. Me. 1906); *Ex parte Reaves*, 121 F. 848 (C.C.M.D. Ala.), *rev'd sub nom. United States v. Reaves*, 126 F. 127 (5th Cir. 1903); *In re Carver*, 103 F. 624 (C.C.D. Me. 1900); *In re Kaufman*, 41 F. 876 (C.C.D. Md. 1890); *In re Dohendorf*, 40 F. 148 (C.C.D. Kan. 1889); *In re Cosenow*, 37 F. 668 (C.C.E.D. Mich. 1889); *In re Baker*, 23 F. 30 (C.C.D.R.I. 1885); *In re Davison*, 21 F. 618 (C.C.S.D.N.Y. 1884); *In re Wall*, 8 F. 85 (C.C.D. Mass. 1881); *Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921); *Ex parte Rush*, 246 F. 172 (M.D. Ala. 1917); *Ex parte Dostal*, 243 F. 664 (N.D. Ohio 1917); *Ex parte Foley*, 243 F. 470 (W.D. Ky. 1917); *United States ex rel. Lazarus v. Rush*, 242 F. 983 (E.D. Pa. 1917); *Ex parte Lisk*, 145 F. 860 (E.D. Va. 1906); *In re Dowd*, 90 F. 718 (N.D. Cal. 1898); *In re Spencer*, 40 F. 149 (D. Kan. 1889).

<sup>173</sup>See, e.g., *United States v. Grimley*, 137 U.S. 147 (1890), *rev'g* 38 F. 84 (C.C.D. Mass. 1889).

<sup>174</sup>See, e.g., *Ex parte Kerekes*, 274 F. 870 (E.D. Mich. 1921); *Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921); *Ex parte Dostal*, 243 F. 664 (N.D. Ohio 1917).

<sup>175</sup>See, e.g., *In re McVey*, 23 F. 878 (D. Cal. 1885).

Wars, the courts reviewed a number of habeas petitions alleging unlawful inductions.<sup>176</sup>

Third, federal courts would collaterally review military proceedings to determine whether courts-martial were lawfully convened and constituted.<sup>177</sup> This usually encompassed compliance with applicable statutes for the creation of the court,<sup>178</sup> and the convening of the court by a commander empowered to do so.<sup>179</sup> In *McClaghry v. Deming*,<sup>180</sup> an officer of the Volunteer Army of the United States, created during the Spanish-American War, was tried, convicted, and sentenced by a court-martial composed of Regular Army officers. Under the Articles of War then in effect, officers of the Regular Army were not competent to sit on courts-martial to try the officers or soldiers of other forces.<sup>181</sup> Because the court-martial, a statutory body, was constituted in direct violation of statute, the Supreme Court held that the court-martial had no jurisdiction: "A court-martial is a creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."<sup>182</sup>

Despite the expansive language of *Deming*, which seemed capable of reaching all statutory defects in court-martial proceedings, the

<sup>176</sup>During World War I, induction was not dependent upon the acceptance or oath of the individual; rather, it became effective according to the terms of the notice sent to the individual informing him he was drafted. If the individual failed to report according to the notice, he was a deserter and subject to court-martial. Consequently, much of the litigation in the federal courts involved the sufficiency of the notice. See, e.g., *Ver Mehren v. Sirmeyer*, 36 F.2d 876 (8th Cir. 1929); *Ex parte McIntyre*, 4 F.2d 823 (9th Cir. 1925); *United States v. Bullard*, 290 F. 704 (2d Cir. 1923); *Ex parte Bergdoll*, 274 F. 458 (D. Kan. 1921); *Ex parte Goldstein*, 268 F. 431 (D. Mass. 1920). See also *Ex parte Thieret*, 268 F. 472 (6th Cir. 1920) (exemption claim); *Ex parte Tinkoff*, 254 F. 912 (D. Mass. 1919) (exemption claim).

Congress changed the induction statute for World War II. Induction was completed only upon submission to the oath of induction. Persons who failed to comply with draft notices before taking the induction oath were still civilians, and subject only to trial in the civil courts. *Billings v. Truesdell*, 321 U.S. 542 (1944). Thus, many cases, which would have been tried by courts-martial during the First World War, were tried in the civil courts during World War II. Issues that reached courts-martial, and the federal courts by collateral review, generally dealt with defects in the formality of the induction process. See, e.g., *Sanford v. Callan*, 148 F.2d 376 (5th Cir.), *petition for cert. dismissed*, 326 U.S. 679 (1945); *Ex parte Kruk*, 62 F. Supp. 901 (N.D. Cal. 1945); *United States ex rel. Seldner v. Mellis*, 59 F. Supp. 682 (M.D.N.C. 1945).

<sup>177</sup>See note 156 *supra*.

<sup>178</sup>See, e.g., *United States v. Brown*, 206 U.S. 240 (1907), *aff'd* 41 Ct. Cl. 275 (1906); *Frazier v. Anderson*, 2 F.2d 36, 38 (8th Cir. 1924); *Walsh v. United States*, 43 Ct. Cl. 225, 228-29 (1908).

<sup>179</sup>See, e.g., *Givens v. Zerst*, 255 U.S. 11 (1921); *United States v. Smith*, 197 U.S. 386 (1905); *Swaim v. United States*, 165 U.S. 553, 218-24 (1897).

<sup>180</sup>186 U.S. 49 (1902).

<sup>181</sup>*Id.* at 51.

<sup>182</sup>*Id.* at 62.



decision was never broadly construed.<sup>183</sup> Most statutory provisions were deemed directory in character, and, where they offered the convening authority any discretion, such as in the size of the court, the seniority of its members, or the availability of judge advocates to serve with the court, the exercise of that discretion was reviewed only if grossly abused.<sup>184</sup>

Finally, court-martial proceedings could be collaterally reviewed to ascertain whether sentences adjudged were duly approved and authorized by law.<sup>185</sup> Generally, review in this area was limited to determining whether the sentence was within statutory limits,<sup>186</sup> whether the sentence was supported by sufficient vote of the members,<sup>187</sup> and whether the sentence was duly approved as required by law.<sup>188</sup> Challenges to the excessiveness of sentences that were nonetheless within authorized limits, however, were not entertained;<sup>189</sup>

<sup>183</sup>See *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1211-13, 1227-28. See also *Allen v. Van Cantfort*, 436 F.2d 625, 628 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971). Similarly, *Deming* generally has not been expanded to encompass military administrative proceedings. See, e.g., *Dilley v. Alexander*, 603 F.2d 914, 921-22 (D.C. Cir. 1979).

<sup>184</sup>*Hiatt v. Brown*, 339 U.S. 103, 109-10 (1950) (availability of judge advocate as law member); *Kahn v. Anderson*, 255 U.S. 1, 6-7 (1921) (court of less than 13 members); *Bishop v. United States*, 197 U.S. 334, 340 (1905) (court of less than 13 members); *Swaim v. United States*, 165 U.S. 553, 560 (1897) (seniority of membership); *Mullan v. United States*, 140 U.S. 240, 244-45 (1891) (seniority of membership).

<sup>185</sup>See note 156 *supra*.

<sup>186</sup>See, e.g., *In re Brodie*, 128 F. 665, 671-72 (8th Cir. 1904); *Rose ex rel. Carter v. Roberts*, 99 F. 948 (2d Cir.), *cert. denied*, 176 U.S. 684 (1900); *In re Langan*, 123 F. 132, 134-35 (C.C.E.D. Mo. 1903); *Ex parte Hewitt*, 12 F. Cas. 73 (S.D. Miss 1869) (No. 6,442); *Williams v. United States*, 24 Ct. Cl. 306, 315-16 (1889).

<sup>187</sup>See, e.g., *Stout v. Hancock*, 146 F.2d 741 (4th Cir. 1944), *cert. denied*, 325 U.S. 850 (1945); *Ex parte Beshershe*, 63 F. Supp. 997 (D. Mont.), *appeal dismissed sub nom. Beshershe v. Weyand*, 155 F.2d 723 (9th Cir. 1945); *Hurse v. Caffey*, 59 F. Supp. 363 (N.D. Tex. 1945).

<sup>188</sup>One of the leading cases in this area is *Runkle v. United States*, 122 U.S. 543 (1887), in which the Supreme Court held that a sentence of dismissal of an officer was void because it did not appear in the record of proceedings that it had been personally approved by the President as required by law. *Runkle* prompted a flurry of similar collateral attacks, was soon limited to its peculiar facts, and was not followed again. *Bishop v. United States*, 197 U.S. 334, 341-42 (1905) (*Runkle* was based on circumstances so exceptional "as to render it an unsafe precedent in any other" case); *Ide v. United States*, 150 U.S. 517 (1893); *United States v. Fletcher*, 148 U.S. 84 (1893); *United States v. Page*, 137 U.S. 673 (1891), *rev'd* 25 Ct. Cl. 254 (1890); *Armstrong v. United States*, 26 Ct. Cl. 387 (1891). See also *Swaim v. United States*, 165 U.S. 553 (1897); *Ex parte Reed*, 100 U.S. 13 (1879); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Aderhold v. Menefee*, 67 F.2d 345 (5th Cir. 1933), *rev'd* 5 F. Supp. 102 (N.D. Ga. 1932); *United States ex rel. Harris v. Daniels*, 279 F. 844 (2d Cir. 1922); *Ex parte Mason*, 256 F. 384 (C.C.N.D.N.Y. 1882); *United States ex rel. Williams v. Barry*, 260 F. 291 (S.D.N.Y. 1919); *Lyon v. United States*, 48 Ct. Cl. 30 (1912).

<sup>189</sup>See, e.g., *Swaim v. United States*, 165 U.S. 553, 566 (1897); *Ex parte Mason*, 105 U.S. 696 (1882); *Ex parte Dickey*, 204 F. 322, 325-26 (D. Me. 1913); *Colman v. United States*, 38 Ct. Cl. 315, 337 (1903). Cf. *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 127 (1848) (punishment not incident to court-martial).



nor did the courts look favorably on other forms of attacks on sentences that were consistent with statute.<sup>190</sup>

Thus, before World War II, the extent of federal court review of military convictions rarely went beyond questions of technical jurisdiction.<sup>191</sup> The civil courts would not review claims of mere errors or irregularities in the proceedings of courts-martial,<sup>192</sup> nor would they

<sup>190</sup>See, e.g., *Givens v. Zerbst*, 255 U.S. 11, 22 (1921) (place of confinement); *Mosher v. Hudspeth*, 123 F.2d 401, 402 (10th Cir. 1941), *cert. denied*, 316 U.S. 670 (1942) (consecutive, rather than concurrent, sentence); *Kirkman v. McClaughry*, 160 F. 436 (8th Cir. 1908), *aff'd* 152 F. 255 (C.C.D. Kan. 1907) (consecutive, rather than concurrent, sentence).

Challenges to court-martial sentences were varied and often unique. For an example of a multiple attack on a court-martial sentence, see *Carter v. McClaughry*, 183 U.S. 365 (1902), which was one of several lawsuits brought by Captain Oberlin M. Carter to overturn his 1898 court-martial conviction for fraud and embezzlement. For sheer persistence, Captain Carter stands out among all others seeking to collaterally overturn court-martial convictions. For almost forty years, he peppered the courts with lawsuits attacking his conviction, and the litigation, as one court described it, "had a long and devious history in the courts." *Carter v. Woodring*, 92 F.2d 544 (D.C. Cir.), *cert. denied*, 302 U.S. 752 (1937). See *In re Carter*, 97 F. 496 (C.C.S.D.N.Y. 1899), *aff'd sub nom. Rose ex rel. Carter v. Roberts*, 99 F. 948 (2d Cir.), *cert. denied*, 176 U.S. 684 (1900), *appeal dismissed sub nom. Carter v. Roberts*, 177 U.S. 496 (1900); *Carter v. McClaughry*, 105 F. 614 (C.C.D. Kan. 1900), *aff'd*, 183 U.S. 365 (1902); *Carter v. Woodring*, 92 F.2d 544 (D.C. Cir.), *cert. denied*, 302 U.S. 752 (1937). See also *Burns v. Wilson*, 346 U.S. 844, 846 (Frankfurter, J., dissenting). Indeed, there were some who attempted to portray Captain Carter as the "American Dreyfus." See Note, *Judicial Review of Courts Martial*, 7 Geo. Wash. L. Rev. 503, 513 n. 97 (1938-39), and accompanying text.

<sup>191</sup>It should be noted at this juncture that, although some early decisions appeared to require that the regularity of the military court's proceedings appear on the face of the record, see, e.g., *Runkle v. United States*, 122 U.S. 543, 555-56 (1887), later decisions permitted the government to prove the existence of jurisdiction by extrinsic evidence. See *Givens v. Zerbst*, 255 U.S. 11 (1921); *Ver Mehren v. Sirmeyer*, 36 F.2d 876 (8th Cir. 1929) (dicta); *McRae v. Henkes*, 273 F. 108 (8th Cir. 1921); *Ex parte Bergdoll*, 274 F. 458 (D. Kan. 1921).

<sup>192</sup>See, e.g., *Mullan v. United States*, 212 U.S. 516 (1909) (evidentiary errors); *Swaim v. United States*, 165 U.S. 553 (1897), *aff'd* 28 Ct. Cl. 173 (1893) (evidentiary errors, hostile member on court); *Romero v. Squires*, 133 F.2d 528 (9th Cir.), *cert. denied*, 318 U.S. 785 (1943) (improper processing of record of trial); *Ex parte Henderson*, 11 F. Cas. 1067 (C.C.D. Ky. 1878) (No. 6,349) (rules of court-martial procedure violated); *Ex parte Potens*, 63 F. Supp. 582 (E.D. Wis. 1945) (erroneous resolution of evidentiary conflicts); *Ex parte Joly*, 290 F. 858 (S.D.N.Y. 1922) (evidentiary errors and improper comments by trial judge advocate); *Ex parte Dickey*, 204 F. 322 (D. Me. 1913) (improper service of charges); *In re Bird*, 3 F. Cas. 425 (D. Ore. 1871) (No. 1,428) (delay in bringing accused to trial); *Keyes v. United States*, 15 Ct. Cl. 532 (1879) (accuser became member of court), *aff'd*, 109 U.S. 336 (1883). But see *Meade v. Deputy Marshal*, 16 F. Cas. 1291 (C.C.D. Va. 1815) (No. 9,372) (absence of notice voids proceedings); *Weirman v. United States*, 36 Ct. Cl. 236 (1901) (claimed absence of accused reviewable).

review matters of defense<sup>193</sup> or matters in bar of trial, such as the statute of limitations.<sup>194</sup> Most importantly, constitutional issues, the mainstay of contemporary collateral challenges,<sup>195</sup> generally were beyond the scope of federal court review. For example, in *Collins v. McDonald*,<sup>196</sup> a military prisoner sought habeas relief from a sentence imposed by a court-martial in Vladivostok, Siberia, upon a conviction for robbery. He claimed, among other things, that a confession, allegedly made under duress and in violation of the Fifth Amendment, was admitted against him at the trial. The Supreme Court rejected his claim, holding: "This . . . at most, was an error in the admission of testimony which cannot be reviewed in a habeas corpus proceeding."<sup>197</sup>

Manifestly, the scope of matters open to review in collateral attacks on courts-martial before World War II was acutely and uniformly limited. "Nothing was better settled than the proposition that the federal courts . . . [would] most strictly limit themselves to" determining questions of technical jurisdiction.<sup>198</sup> This long-standing rule, however, was about to change.

### C. COLLATERAL REVIEW FROM 1941 TO 1953: A PERIOD OF TRANSITION

With the onset of World War II, some lower federal courts began broadening the issues cognizable in collateral challenges to include

<sup>193</sup>See, e.g., *Romero v. Squires*, 133 F.2d 528 (9th Cir.), cert. denied, 318 U.S. 785 (1943) (entrapment); *Aderhold v. Menefee*, 67 F.2d 345 (5th Cir. 1933), rev'd 5 F. Supp. 102 (N.D. Ga. 1932) (self-defense); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943) (defense to desertion charge). But see *United States ex rel. Doughty v. Hunt*, 254 F. 365 (S.D.N.Y. 1918) (court assumed court-martial would lose jurisdiction under Manual for Courts-Martial if the accused suffered from mental defect).

<sup>194</sup>See, e.g., *In re Cadwallader*, 127 F. 881 (C.C.E.D. Mo. 1904); *In re Zimmerman*, 30 F. 176 (C.C.N.D. Cal. 1887); *In re Davison*, 21 F. 618 (C.C.S.D.N.Y. 1884); *In re White*, 17 F. 723 (C.C.D. Cal. 1883); *Ex parte Townsend*, 133 F. 74 (D. Neb. 1904).

<sup>195</sup>See, e.g., *United States v. Augenblick*, 393 U.S. 348 (1969).

<sup>196</sup>258 U.S. 416 (1922).

<sup>197</sup>*Id.* at 420-21. See also *Sanford v. Robbins*, 115 F.2d 435 (5th Cir.), cert. denied, 312 U.S. 697 (1940) (double jeopardy); *McRae v. Henkes*, 273 F. 108 (8th Cir. 1921) (double jeopardy); *United States v. Maney*, 61 F. 140 (C.C.D. Minn. 1894) (double jeopardy); *In re Esmond*, 16 D.C. (5 Mackey) 64 (1886) (double jeopardy); *Ex parte Joly*, 290 F. 858 (S.D.N.Y. 1922) (ineffective counsel). But cf. *Johnson v. Sayre*, 158 U.S. 109 (1895) (claimed violation of Eighth Amendment rejected on its merits); *In re Stubbs*, 133 F. 1012 (C.C.D. Wash. 1905) (double jeopardy claim rejected on its merits); *Ex parte Costello*, 8 F.2d 386 (E.D. Va. 1925) (double jeopardy claim rejected on its merits).

<sup>198</sup>Bishop, *supra* note 6, at 43-44. See also Note, *Judicial Review of Courts-Martial*, 7 Geo. Wash. L. Rev. 503 (1938-39).

constitutional claims.<sup>199</sup> This expansion, although influenced by such factors as the rapid increase in the number of courts-martial during the war and a concomitant growth in dissatisfaction with the military justice system,<sup>200</sup> was principally in response to the parallel enlargement of collateral review in the civilian sector.<sup>201</sup> Therefore, it is important to undertake a brief examination of the developments in habeas attacks on criminal convictions in the civilian sphere.

### 1. *The Development of Civilian Habeas Corpus*

Until the early twentieth century, the habeas relief accorded civilians roughly mirrored the remedy available to service members. As discussed above, the First Congress empowered the federal courts to issue writs of habeas corpus<sup>202</sup> and an early Supreme Court decision held that the writ would be substantively governed by the common law.<sup>203</sup> Thus, only attacks on the jurisdiction of the courts would be heard. Moreover, it was not until after the Civil War, with the enactment of the Habeas Corpus Act of 1867,<sup>204</sup> that the federal courts acquired jurisdiction to inquire into custody under state authority.<sup>205</sup> Consequently, early case law dealt solely with federal, not state, prisoners.<sup>206</sup>

One of the early leading civilian habeas cases was *Ex parte Watkins*.<sup>207</sup> In *Watkins*, the petitioner challenged his conviction in the

<sup>199</sup>See note 11 *supra*.

<sup>200</sup>See, e.g., Bishop, *supra* note 6, at 45-58; Comment, *Civilian Court Review of Court-Martial Adjudications*, 69 Colum. L. Rev. 1259, 1260 (1969). "At the peak of the World War II mobilization, when some 12,300,000 persons were subject to military law—almost as many as the entire population of the country in 1830—the armed forces handled one third of all criminal cases tried in the nation." Weiner, *supra* note 93, at 11 (footnotes omitted).

<sup>201</sup>Fratcher, *supra* note 9, at 293-95; Katz & Nelson, *supra* note 17, at 200-02; Snedeker, *supra* note 9, at 296-97; Comment, *Civilian Court Review of Court-Martial Adjudications*, 69 Colum. L. Rev. 1259, 1260 (1969); Note, *Civilian Court Review of Military Habeas Corpus Petitions: Is Justice Being Served?*, 44 Fordham L. Rev. 1228, 1232-33 (1976); *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1213; Note, *Federal Habeas Corpus Jurisdiction Over Court-Martial Proceedings*, 20 Wayne L. Rev. 919, 922-23 (1974); Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 383 (1966); Note, *Collateral Attacks on Courts-Martial in the Federal Courts*, 57 Yale L.J. 483, 483, 486 (1947-48).

<sup>202</sup>See note 94 *supra*.

<sup>203</sup>*Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807).

<sup>204</sup>Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

<sup>205</sup>*Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845). It is indeed ironic that state courts, until *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), could collaterally review, by habeas corpus, custody under color of federal law, but federal courts had no power to review the legality of state custody.

<sup>206</sup>See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 465 (1963).

<sup>207</sup>28 U.S. (3 Pet.) 193 (1830).

Circuit Court for the District of Columbia, claiming the indictment failed to state a crime against the United States. The Court, in a decision by Chief Justice Marshall, refused to review the petition, holding:

An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. . . . To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it.<sup>208</sup>

To similar effect was the Court's decision in *Ex parte Parks*,<sup>209</sup> in which it declared that, in considering a habeas corpus petition, it would not look beyond the question of jurisdiction, and "if the [inferior] court had jurisdiction and power to convict and sentence, the writ [could not] issue to correct a mere error."<sup>210</sup>

Following the Civil War, the federal courts broadened the scope of review in two respects, beginning "'a long process of expansion of the concept of a lack of 'jurisdiction.'"<sup>211</sup> First, the Court "announced the rule that habeas corpus may be used to reexamine, not substantive errors going to the conviction, but alleged illegality in

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<sup>208</sup>*Id.* at 203. In dicta, referring to the Court's decision in *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806), Chief Justice Marshall suggested that courts-martial were not entitled to the same deference as courts of record:

This decision [*Wise v. Withers*] proves only that a court-martial was considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record. The declaration that this judgment against a person to whom the jurisdiction of the court could not extend is a nullity, is no authority for inquiring into the judgments of a court of general criminal jurisdiction and regarding them as nullities, if, in our opinion, the court has misconstrued the law, and has pronounced an offense to be punishable criminally, which, as we may think, is not so.

*Id.* at 209.

<sup>209</sup>93 U.S. 18 (1876).

<sup>210</sup>*Id.* at 22-23.

<sup>211</sup>Rosen, *supra* note 34, at 344 (quoting Hart, *The Supreme Court, 1958, Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 103-04 (1959)).

the sentence."<sup>212</sup> For example, in *Ex parte Lange*,<sup>213</sup> the Court granted relief to a federal prisoner who had been twice sentenced for the same crime, in violation of his right to be free from double jeopardy under the Fifth Amendment. The Supreme Court held that, once the first sentence was adjudged and executed, the district court lacked jurisdiction to impose the second sentence.<sup>214</sup>

Second, beginning with *Ex parte Siebold*,<sup>215</sup> the Court held that it could review the constitutionality of statutes creating offenses of which habeas prisoners were convicted, for if the statutes were unconstitutional, the proceedings were void:

The validity of the judgment is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.<sup>216</sup>

On the other hand, during this period, the Court refused to review the merits of a double jeopardy claim where the alleged error did not result in multiple sentences,<sup>217</sup> the adequacy of a federal indictment,<sup>218</sup> and the efficacy of an asserted violation of the right against self-incrimination.<sup>219</sup> Furthermore, except as noted above, the Court "repeatedly reaffirmed its adherence to the traditional formulation of habeas jurisdiction" by strict application of the jurisdictional test.<sup>220</sup>

There were no military habeas cases during this period that similarly expanded the scope of review. This could simply be due to the fact that similar issues never arose. Some commentators have attributed this "softening of the concept of jurisdiction" to the fact the Supreme Court, at the time, had no regular means of directly

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<sup>212</sup>Bator, *supra* note 206, at 467.

<sup>213</sup>85 U.S. (18 Wall.) 163 (1873).

<sup>214</sup>*Id.* at 178. See also *Ex parte Wilson*, 114 U.S. 417 (1885) (absence of grand jury indictment vitiates sentence for "infamous" crime). See generally Bator, *supra* note 206, at 467-68.

<sup>215</sup>100 U.S. 371 (1879).

<sup>216</sup>*Id.* at 376-77.

<sup>217</sup>*Ex parte Bigelow*, 113 U.S. 328 (1885).

<sup>218</sup>*Ex parte Parks*, 93 U.S. 18 (1876).

<sup>219</sup>*Matter of Moran*, 203 U.S. 96 (1906).

<sup>220</sup>Rosenn, *supra* note 34, at 344. See also Bator, *supra* note 206, at 471.

reviewing federal criminal convictions.<sup>221</sup> Once Congress authorized direct appeal in federal criminal cases, the Court repudiated its holding in *Siebold*.<sup>222</sup>

By the Habeas Corpus Act of 1867,<sup>223</sup> the federal courts were given habeas corpus jurisdiction over those in custody under color of state authority. However, Congress removed the Supreme Court's appellate jurisdiction in state habeas proceedings the following year,<sup>224</sup> and did not restore it until 1885.<sup>225</sup> Thus, the Supreme Court did not hear a case brought by a state petitioner until 1886, when it issued its opinion in *Ex parte Royall*.<sup>226</sup> In *Royall*, the petitioner challenged the constitutionality of a state statute under which he had been indicted, but not yet tried. The Court acknowledged that, under *Siebold*, the constitutionality of the state statute was subject to federal habeas corpus review;<sup>227</sup> however, the Court required the petitioner to first exhaust his state court remedies.<sup>228</sup> The Habeas Corpus Act was not thereafter used as a tool to expand the scope of

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<sup>221</sup>*Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1046. See also Bator, *supra* note 206, at 473.

Prior to 1889, the Supreme Court could only review federal criminal convictions when there was a split of opinion in the circuit court on a question of law. Act of June 1, 1872, ch. 255, § 1, 17 Stat. 196; Act of April 29, 1802, ch. 31 § 6, 2 Stat. 159. In 1889, a writ of error became available to the Supreme Court in capital cases, Act of Feb. 6, 1889, ch. 133, § 6, 25 Stat. 656, which was extended to all cases involving "infamous" crimes in 1891. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827. "The latter [statute] also provided for appeals in criminal cases to the newly created courts of appeals, with review by the Supreme Court on certiorari or in a case of a certification of a question of law by the court of appeals." Bator, *supra* note 206, at 473 n.75.

<sup>222</sup>See, e.g., *In re Lincoln*, 202 U.S. 178 (1906) (constitutionality of statute should be attacked by means of direct review). See generally Bator, *supra* note 206, at 473-74; *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1047.

<sup>223</sup>Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified as 28 U.S.C. § 2241(c)(3) (1982)). The impetus for the Act was the South's efforts to undermine the Thirteenth Amendment following the Civil War. Rosenn, *supra* note 34, at 341-42.

Prior to 1867, there had been two limited grants of federal habeas jurisdiction over state custody. Federal habeas corpus was "available to federal officers in state custody for acts committed in furtherance of federal law," and "to subjects or citizens of foreign governments who were detained under state or federal authority for acts done pursuant to the law of a foreign sovereign." Rosenn, *supra* note 34, at 340-41 (citing Act of March 2, 1833, ch. 57, § 7, 4 Stat. 632, 634 (current version at 28 U.S.C. § 2241(c)(2) (1982)), and Act of Aug. 29, 1842, ch. 257, 5 Stat. 539).

<sup>224</sup>Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44. Jurisdiction was removed to prevent the Supreme Court from passing on the constitutionality of reconstruction legislation. Bator, *supra* note 206, at 465 n.49. The Court upheld the removal of jurisdiction in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

<sup>225</sup>Act of March 3, 1885, ch. 353, 23 Stat. 437.

<sup>226</sup>117 U.S. 241 (1886).

<sup>227</sup>*Id.* at 248, 250.

<sup>228</sup>*Id.* at 252-53.



habeas review; relief would only be granted if the state court lacked jurisdiction.<sup>229</sup>

Thus, as of the beginning of the twentieth century, civilian habeas corpus generally was limited to questions of jurisdiction; that is, "if a court of competent jurisdiction adjudicated a federal question in a criminal case, its decision on that question was final, subject only to appeal, and not subject to redetermination on habeas corpus."<sup>230</sup>

Starting in 1915, the face of the habeas remedy began to change. With its decisions in *Frank v. Mangum*,<sup>231</sup> *Moore v. Dempsey*,<sup>232</sup> *Johnson v. Zerbst*,<sup>233</sup> and *Waley v. Johnston*,<sup>234</sup> the Court expanded both the scope and method of review in of habeas corpus.

In *Frank*, a Jewish businessman in Atlanta, Leo Frank, had been convicted and sentenced to death for the murder of a 14-year old girl. In his petition, Frank claimed that he had been denied due process of law under the Fourteenth Amendment because his trial had been dominated by the threat of mob violence. Using the rubric of jurisdiction, which was still the only basis for habeas relief, Frank argued that the mob's influence made impartial adjudication of his case impossible and caused the trial court to lose its jurisdiction. The Georgia courts, in a series of proceedings, rejected Frank's claims. The federal district court dismissed his habeas petition.

On appeal, the Supreme Court conceded that, if a trial in fact is so dominated by a mob that there is "actual interference with the course of justice," due process of law is denied.<sup>235</sup> Moreover, the Court noted that, under the Habeas Corpus Act of 1867, Congress had expanded the common law scope of inquiry, and federal courts could look beyond the record of a state's proceedings to test for jurisdiction, and conduct "a more searching investigation" of the substance of a petitioner's claims.<sup>236</sup> But the Court refused to review the merits of Frank's claims; instead, it considered the treatment given his claims by the state courts and denied relief on the ground the state courts had "accorded to him the fullest right and opportunity to be heard . . . ."<sup>237</sup> Thus, the Supreme Court "added a crucial

<sup>229</sup>See, e.g., *In re Converse*, 137 U.S. 624, 631-32 (1891). See generally *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1049-50.

<sup>230</sup>Bator, *supra* note 206, at 483.

<sup>231</sup>237 U.S. 309 (1915).

<sup>232</sup>261 U.S. 86 (1923).

<sup>233</sup>304 U.S. 458 (1938).

<sup>234</sup>316 U.S. 102 (1942).

<sup>235</sup>*Frank v. Mangum*, 237 U.S. at 335.

<sup>236</sup>*Id.* at 330-31.

<sup>237</sup>*Id.* at 345.



weapon to the arsenal of the habeas corpus court" by holding that due process claims were to be evaluated in light of the adequacy of the state's "corrective process," and not merely with regard to the state court's jurisdiction.<sup>238</sup> Where, however, the state courts fully litigated a petitioner's claims, they were not open to further review on habeas corpus.<sup>239</sup>

*Moore v. Dempsey* was similar to *Frank*. Five blacks sentenced to death for the murder of a white man alleged in their petition for habeas corpus that their trial had been consistently threatened by the outbreak of mob violence. As in *Frank*, the state courts had considered the petitioners' claims, although not as extensively. Although somewhat unclear,<sup>240</sup> the Court apparently held that the state courts' cursory examination of the constitutional issues could not preclude federal court review on habeas corpus: "We shall not say more concerning the corrective process afforded to the petitioners than it does not seem to us sufficient to allow a judge of the United States to escape the duty of examining the facts himself . . . ."<sup>241</sup>

Thus, in *Frank* and *Moore*, the Supreme Court expanded the scope and means of habeas corpus review to permit federal courts to look beyond the record of proceedings and examine not only the technical jurisdiction of the state courts, but also the adequacy of states' "corrective processes" in litigating prisoners' constitutional claims. Only if a state court fully and fairly considered the claims of a prisoner was federal habeas review of the merits of the claims proscribed.<sup>242</sup>

With *Johnson v. Zerbst*, the Court explicitly broadened the types of issues subject to consideration in habeas proceedings to include constitutional claims. The Court held that it was "clearly erroneous to confine the inquiry" to issues of technical jurisdiction,<sup>243</sup> and that a court will lose jurisdiction if it deprives a defendant of his Sixth Amendment right to assistance of counsel.<sup>244</sup>

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<sup>238</sup>Bator, *supra* note 206, at 486-87. See also *Developments of the Law—Federal Habeas Corpus*, *supra* note 18, at 1050.

<sup>239</sup>Bator, *supra* note 206, at 487; Rosenn, *supra* note 34, at 346.

<sup>240</sup>There is disagreement among legal scholars as to whether *Moore* greatly broadened federal habeas jurisdiction beyond that permitted in *Frank*, or whether it was entirely consistent with *Frank*. See *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1051-53. See also Bator, *supra* note 206, at 488-93. See generally Rosenn, *supra* note 34, at 346 n.76.

<sup>241</sup>*Moore v. Dempsey*, 261 U.S. at 92.

<sup>242</sup>This was the law until *Brown v. Allen*, 344 U.S. 443 (1953). See, e.g., *Ex parte Hawk*, 321 U.S. 114, 118 (1944); Bator, *supra* note 206, at 493-99.

<sup>243</sup>*Johnson v. Zerbst*, 304 U.S. at 466.

<sup>244</sup>*Id.* at 467.

The Supreme Court abandoned the rubric of jurisdiction altogether in *Waley v. Johnston*, a case involving an allegation by a habeas petitioner that an agent of the Federal Bureau of Investigation coerced him to plead guilty to an indictment for kidnapping:

The issue here was appropriately raised by the habeas corpus petition. The facts relied on are de hors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances, the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.<sup>245</sup>

Therefore, by World War II, civilian habeas corpus law had abandoned the language of jurisdiction and had fully encompassed scrutiny of constitutional claims. Not until *Brown v. Allen*<sup>246</sup> would the federal habeas courts "reconsider constitutional contentions that had been fully litigated in the state courts."<sup>247</sup> But the scope of civilian habeas corpus had grown from an inquiry restricted to technical jurisdiction to a limited review of federal constitutional claims to ascertain whether they were fully litigated in the state courts. This growth was to have a significant impact on the course of collateral challenges to military convictions.

## 2. The Expansion of Collateral Review in the Lower Federal Courts

Influenced by the developments in the civilian sector, a number of lower federal courts broadened the scope of their inquiry in collateral attacks on military convictions to include constitutional claims. This expansion, however, was by no means uniform throughout the federal judiciary. Some federal courts adhered to the traditional scope of review, jurisdiction.<sup>248</sup> Others, including the Supreme

<sup>245</sup>316 U.S. at 104-05. The Court similarly expanded review for state petitioners. See *House v. Mayo*, 324 U.S. 42 (1945); *Ex parte Hawk*, 321 U.S. 114, 118 (1944).

<sup>246</sup>344 U.S. 443 (1953). See *infra*, notes 321-26, and accompanying text.

<sup>247</sup>Rosenn, *supra* note 34, at 346.

<sup>248</sup>See, e.g., *United States ex rel. Innes v. Crystal*, 131 F.2d 577 (2d Cir. 1943); *Ex parte Campo*, 71 F. Supp. 543 (S.D.N.Y.), *aff'd sub nom. United States ex rel. Campo v. Swenson*, 165 F.2d 213 (2d Cir. 1947); *Ex parte Beshorse*, 63 F. Supp. 997, 998 (D. Mont. 1945), *appeal dismissed sub nom. Beshorse v. Weyand*, 155 F.2d 723 (9th Cir. 1946); *Ex parte Benton*, 63 F. Supp. 808, 809-10 (N.D. Cal. 1945); *Ex parte Potens*, 63 F. Supp. 582 (E.D. Wis. 1945); *United States ex rel. Marino v. Hildreth*, 61 F. Supp. 667, 669 (E.D.N.Y. 1945); *In re Berue*, 54 F. Supp. 252, 254 (S.D. Ohio 1944). Cf. *In re Yamashita*, 327 U.S. 1 (1946) (military commission); *Ex parte Quirin*, 317 U.S. 1 (1942) (military commission).

Court in *Wade v. Hunter*,<sup>249</sup> explicitly avoided the issue.<sup>250</sup> Several courts, while articulating either the traditional scope of review or no scope of review at all, seemingly reviewed the merits of constitutional claims or determined that the claims had been fully and fairly considered by the military courts.<sup>251</sup> Finally, many cases simply dealt with issues of technical jurisdiction and the question of the proper scope of review never arose.<sup>252</sup>

The first break from the restricted scope of inquiry came in the Eighth Circuit case of *Schita v. King*.<sup>253</sup> Schita was convicted by general court-martial in 1917 for murder and felonious assault and was sentenced, *inter alia*, to life imprisonment. He sought habeas relief, alleging a myriad of purported due process violations in the court-martial proceedings.<sup>254</sup> The district court refused to look beyond the jurisdiction of the military court that tried Schita and dismissed the petition.<sup>255</sup> Relying on the recent developments in civilian habeas review, the Court of Appeals reversed, holding that the district court had an obligation to conduct a hearing into Schita's due process claims.<sup>256</sup>

On remand, the district court conducted an evidentiary hearing and again dismissed Schita's petition.<sup>257</sup> This time, the Eighth Circuit

<sup>249</sup>336 U.S. 684, 688 n.4 (1949) (Court did not reach issue of whether double jeopardy issue is subject to attack in collateral proceeding).

<sup>250</sup>*See, e.g.,* *Romero v. Squires*, 133 F.2d 528, 530 (9th Cir.), *cert. denied*, 318 U.S. 785 (1943).

<sup>251</sup>*See, e.g.,* *Brown v. Sanford*, 170 F.2d 344 (5th Cir. 1948); *Waite v. Overlade*, 164 F.2d 722 (7th Cir. 1947), *cert. denied*, 334 U.S. 812 (1948); *Reilly v. Pescor*, 156 F.2d 632 (8th Cir.), *cert. denied*, 329 U.S. 790 (1946); *Altmayer v. Sanford*, 148 F.2d 161 (5th Cir. 1945); *Sanford v. Robbins*, 115 F.2d 435 (5th Cir.), *cert. denied*, 312 U.S. 697 (1940).

<sup>252</sup>*See, e.g.,* *Humphrey v. Smith*, 336 U.S. 695 (1949) (jurisdictional significance of pretrial investigation); *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949) (personal jurisdiction over offenses from previous term of service); *Billings v. Truesdell*, 321 U.S. 542 (1944) (personal jurisdiction over draftee); *Anderson v. Hunter*, 177 F.2d 770 (10th Cir. 1949) (legality of sentence); *United States ex rel. Pasela v. Fenno*, 167 F.2d 593 (2d Cir.), *cert. denied*, 335 U.S. 806 (1948) (personal jurisdiction over reservist); *Rosborough v. Russell*, 150 F.2d 809 (1st Cir. 1945) (subject-matter jurisdiction); *Stout v. Hancock*, 146 F.2d 741 (1st Cir. 1944), *cert. denied*, 325 U.S. 850 (1945) (legality of sentence); *Mosher v. Hudspeth*, 123 F.2d 401 (10th Cir. 1941), *cert. denied*, 316 U.S. 670 (1942) (jurisdiction over military prisoner); *Parker v. Hiatt*, 86 F. Supp. 27 (N.D. Ga. 1949) (composition of court); *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y. 1943) (personal jurisdiction over civilian).

<sup>253</sup>133 F.2d 283 (8th Cir. 1943).

<sup>254</sup>For example, Schita asserted that he was denied counsel of his choice, he was represented by an unprepared counsel, he was denied the right to call witnesses in his own behalf, he was denied the right to confront adverse witnesses, witnesses who testified against him were never sworn, he and his witnesses were intimidated, and he was denied his right of appeal. *Id.*

<sup>255</sup>*Id.* at 287.

<sup>256</sup>*Id.*

<sup>257</sup>*Schita v. Cox*, 139 F.2d 971, 972-73 (8th Cir.), *cert. denied*, 322 U.S. 761 (1944).

affirmed the dismissal, refusing to disturb the findings of the district court.<sup>258</sup> The court noted, however, referring to its first decision:

Petitioner charges irregularities in the military court proceedings which are of a grave nature and, although the rule has been often stated that the proceedings and judgment of a military tribunal, properly constituted and having jurisdiction, will not be reviewed by a civilian court . . . , nevertheless we were of the opinion on first hearing this appeal that if such irregularities as alleged actually existed, constitutional points would be raised justifying our interference.<sup>259</sup>

Similarly, the Third Circuit, in *United States ex rel. Innes v. Hiatt*,<sup>260</sup> held that it could review a habeas petitioner's asserted deprivation of constitutional rights arising from a putative *ex parte* meeting between the trial judge advocate and the members of the petitioner's court-martial. The court denied the petitioner's claim on its merits.<sup>261</sup> Two years later, Judge Biggs of the Third Circuit, sitting as a district judge, ordered a military prisoner discharged from confinement based upon cumulative errors in his court-martial amounting to a denial of due process.<sup>262</sup>

Perhaps the most intriguing case during the period was *Shapiro v. United States*,<sup>263</sup> which applied the broadened scope of review to a back pay claim. Second Lieutenant Shapiro was appointed to defend an American soldier of Mexican descent before a court-martial on the charge of assault with intent to commit rape. Believing the charge to be the result of mistaken identity, Shapiro substituted another American soldier of Mexican descent for the real accused during the trial. The substitute was duly identified as the culprit by the prosecuting witness and was convicted. Lieutenant Shapiro thereupon informed the court of his deception; the court was not amused. The real accused was brought to trial, identified as the attacker, and convicted of the offense. Several days later Shapiro was placed under arrest.

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<sup>258</sup>*Id.* at 973.

<sup>259</sup>*Id.* at 971-72.

<sup>260</sup>141 F.2d 664 (3d Cir. 1944).

<sup>261</sup>*Id.* at 667.

<sup>262</sup>*Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946). Judge Biggs found several serious defects in the court-martial proceedings, including the use of an unsworn statement, an inadequate pretrial investigation, ineffective assistance of counsel, suppression of evidence favorable to the petitioner, evidentiary errors, insufficient evidence to support the findings, and improper post-trial review.

<sup>263</sup>69 F. Supp. 205 (Ct. Cl. 1947).

On September 3, 1943, at 12:40 p.m., Lieutenant Shapiro was formally charged with effecting a delay in the orderly progress of court-martial proceedings and informed that he would be tried at 2:00 p.m. that afternoon at a location 35 to 40 miles away. Shapiro's efforts to get counsel of his choice and a continuance to prepare a defense were unsuccessful. He was convicted of the offense at 5:30 p.m. and sentenced to be dismissed from the service. Shapiro was reinducted as a private in September 1944.

Shapiro brought a claim for back pay in the Court of Claims, alleging a deprivation of his right to due process of law. The Court of Claims agreed, stating in rather strong language:

A more flagrant case of military depotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of his superior officers on the court—who had, indeed, made them look ridiculous. It was a case of almost complete denial of plaintiff's constitutional rights. It brings great discredit upon the administration of military justice.<sup>264</sup>

Moreover, the court rejected the government's argument that its review was limited to the question of the technical jurisdiction of the court-martial.<sup>265</sup> Relying on *Johnson v. Zerbst*,<sup>266</sup> the court held that the military's denial of Shapiro's Fifth and Sixth Amendment rights caused the court-martial to lose jurisdiction, and its judgment was void:

Since there was undoubtedly a denial of plaintiff's rights preserved under the Fifth and Sixth Amendments, and since the Supreme Court has held that a denial of the right of counsel deprives the court of further jurisdiction to proceed, we must hold the conviction void and the dismissal based on it illegal. If illegal, plaintiff did not thereby lose his right to the emoluments of his office and this court may render judgment for any amount he may be able to prove he is entitled to.<sup>267</sup>

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<sup>264</sup>*Id.* at 207.

<sup>265</sup>*Id.* at 207-08.

<sup>266</sup>304 U.S. 458 (1938).

<sup>267</sup>69 F. Supp. at 208. Chief Judge Wakely of the court dissented, stating that the scope of review was restricted to the traditional limits. *Id.*

Thereafter, the Courts of Appeal for the Second,<sup>268</sup> Fifth,<sup>269</sup> and Tenth<sup>270</sup> Circuits adopted the expanded scope of review. With five circuit courts, the Court of Claims, and several district courts examining the constitutional claims of military prisoners, it appeared that the traditional limit of review, jurisdiction, had been abandoned. It was, however, to have one last gasp.

In *Hiatt v. Brown*,<sup>271</sup> the Supreme Court seemingly upset the evolution of collateral attacks on military convictions. In *Brown*, the petitioner had been convicted of murder and sentenced to imprisonment. After exhausting his military appeals, the petitioner sought habeas relief, claiming, among other things, that his court-martial was improperly constituted because the law member was not an officer in The Judge Advocate General's Department and that he was deprived of due process of law because of a variety of other defects in the trial proceedings.

The district court ordered the petitioner released from confinement based on his contention that the court-martial was improperly constituted.<sup>272</sup> The court rejected the petitioner's other grounds for relief.<sup>273</sup> On the government's appeal, the Fifth Circuit affirmed,<sup>274</sup> not only on the basis of the unlawful composition of the court-martial,<sup>275</sup> but also on the ground the petitioner was denied due process of law.<sup>276</sup>

The Fifth Circuit noted that the court-martial record contained a number of "irregularities" and "prejudicial errors," to include the absence of evidence of premeditation, malice, or deliberation, a grossly incompetent law member, the absence of a pretrial investigation, the ineffective assistance of counsel, and an inadequate appellate review by the military.<sup>277</sup> The court concluded that the cumulative effect of these errors deprived the petitioner of due process, "even under military law."<sup>278</sup>

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<sup>268</sup>*Henry v. Hodges*, 171 F.2d 401, 403 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949); *United States ex rel. Weintraub, v. Swenson*, 165 F.2d 756 (2d Cir. 1948).

<sup>269</sup>*Montalvo v. Hunter*, 174 F.2d 645 (5th Cir.), *cert. denied*, 338 U.S. 874 (1949). See also *Durant v. Hiatt*, 81 F. Supp. 948 (N.D. Ga. 1948), *aff'd sub nom. Durant v. Gough*, 177 F.2d 373 (5th Cir. 1949).

<sup>270</sup>*Benjamin v. Hunter*, 169 F.2d 512 (10th Cir. 1948). See also *Anthony v. Hunter*, 71 F. Supp. 823 (D. Kan. 1947).

<sup>271</sup>339 U.S. 103 (1950).

<sup>272</sup>*Brown v. Hiatt*, 81 F. Supp. 647, 649-50 (N.D. Ga. 1948).

<sup>273</sup>*Id.* at 650.

<sup>274</sup>*Hiatt v. Brown*, 175 F.2d 273 (5th Cir. 1949).

<sup>275</sup>*Id.* at 275-76.

<sup>276</sup>*Id.* at 277.

<sup>277</sup>*Id.*

<sup>278</sup>*Id.*



The Supreme Court reversed the judgment of the lower courts.<sup>279</sup> With regard to the composition of the court-martial, the Court held that the convening authority's determination that a Judge Advocate General's Department officer was not available to serve as law member was reviewable only upon a showing of a gross abuse of discretion. No such abuse having been shown, the Court held that the military tribunal had been properly constituted.<sup>280</sup> More importantly, with respect to the putative deprivation of due process, the Court declared:

We think the court [of appeals] was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, the competence of the law member and defense counsel.<sup>281</sup>

Holding that the single inquiry on military habeas corpus was jurisdiction, the Court concluded that "[i]n this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of errors it may have committed is for the military authorities which are alone authorized to review its decisions."<sup>282</sup>

If *Brown* was intended to harken a return to the common law, the lower federal courts were generally unimpressed. While some courts returned to the restricted scope of review,<sup>283</sup> a number of others continued to inquire into constitutional claims.<sup>284</sup> Several reasons may explain why *Brown* did not induce the federal courts to limit their inquiry to technical jurisdiction. First, the Court in *Brown* failed "to explain why contemporary advance made in civilian habeas should not apply to the court-martialed prisoner."<sup>285</sup> Second,

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<sup>279</sup>*Hiatt v. Brown*, 339 U.S. 103 (1950).

<sup>280</sup>*Id.* at 109-10. The Court relied heavily in Judge Learned Hand's decision in *Henry v. Hodges*, 171 F.2d 401 (2d Cir. 1948).

<sup>281</sup>*Id.* at 110.

<sup>282</sup>*Id.* at 111.

<sup>283</sup>*See, e.g., United States ex rel. McClellan v. Humphrey*, 181 F.2d 757, 759 (3d Cir. 1950); *Fly v. United States*, 100 F. Supp. 440 (Ct. Cl. 1951).

<sup>284</sup>*Burns v. Lovett*, 202 F. 335, 339 (D.C. Cir. 1952), *aff'd sub nom. Burns v. Wilson*, 346 U.S. 137 (1953); *Gusik v. Schilder*, 195 F.2d 657 (6th Cir.), *cert. denied*, 344 U.S. 844 (1952); *Kuykendall v. Hunter*, 187 F.2d 545 (10th Cir. 1951).

<sup>285</sup>*Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1214. *See also Note, Federal Habeas Corpus Jurisdiction Over Court-Martial Proceedings*, 20 Wayne L. Rev. 919, 923 (1974).



the opinion was ambiguous, especially in its use of the phrase "lawful powers," which was interpreted to permit inquiry into due process issues, provided the issues were framed under the banner of jurisdiction.<sup>286</sup> Finally, later in the same term in which *Brown* had been decided, the Court issued its opinion in *Whelchel v. McDonald*,<sup>287</sup> which implicitly recognized that review would extend beyond questions of jurisdiction.

In *Whelchel*, the petitioner collaterally attacked his rape conviction by asserting, among other things, that he was insane at the time of the offense and the trial. While refusing to reach the merits of the petitioner's insanity claim, the Court observed:

We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial proceedings that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. *It is only a denial of that opportunity which goes to the question of jurisdiction.* Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts.<sup>288</sup>

*Whelchel* portended the Supreme Court's ultimate abandonment of the limited scope of collateral review.<sup>289</sup>

### D. BURNS v. WILSON: THE "WATERSHED" CASE

The Supreme Court's break with tradition came in 1953 with its decision in *Burns v. Wilson*.<sup>290</sup> The case involved two petitions for habeas corpus by co-accused, Burns and Dennis, who were separately tried and convicted by general court-martial for rape and murder on the island of Guam. Both petitioners were sentenced to death. After exhausting their military remedies, the petitioners sought habeas relief in the federal district court for the District of Columbia. Neither petitioner controverted the technical jurisdiction of their courts-martial; instead, each claimed "that gross irregulari-

<sup>286</sup>*Burns v. Lovett*, 202 F.2d 335, 339 (D.C. Cir. 1952), *aff'd sub nom. Burns v. Wilson*, 346 U.S. 137 (1953). See also *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1215.

<sup>287</sup>340 U.S. 122 (1951).

<sup>288</sup>*Id.* at 124 (emphasis added).

<sup>289</sup>See Note, *Civilian Court Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1261 (1969).

<sup>290</sup>346 U.S. 137 (1953).

ties and improper and unlawful practices rendered the trial[s] and conviction[s] invalid.<sup>291</sup> Specifically, they contended that they had been subjected to unlawful pretrial detention, that coerced confessions had been extorted from them or used against them, that they were denied counsel of their choice, and the opportunity to consult with counsel during their pretrial confinement and that their counsel were not given adequate time to prepare for trial, that certain favorable evidence was suppressed, and perjured evidence was used against them, and that the courts-martial were held in an atmosphere of hysteria, fear, and vengeance.

The district court, in separate opinions, dismissed the petitions.<sup>292</sup> Although unclear, the court apparently restricted its inquiry to the question of jurisdiction, relying on the Supreme Court's decision in *Hiatt v. Brown*.<sup>293</sup> The court did observe, however, the extensive review each petitioner's claim received within the military and concluded "[i]n these circumstances, this court is without jurisdiction to inquire into the matters and things asserted by the petitioner[s] to be grounds for the relief sought . . . ."<sup>294</sup>

The Court of Appeals affirmed the dismissal of the habeas petitions, but held that the scope of review was broader than that applied by the district court.<sup>295</sup> Judge Prettyman, writing for the court, noted that, in *Whelchel v. McDonald*, the Supreme Court "clearly intimated" that review beyond technical questions of jurisdiction was proper.<sup>296</sup> He also declared that service members were protected by the Fifth and Sixth Amendments, "except when an exception is stated in the Constitution itself."<sup>297</sup> Then, observing that collateral review of courts-martial should be different than the review available to state prisoners,<sup>298</sup> Judge Prettyman set out what he believed to be the proper standard of review:

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<sup>291</sup>Burns v. Lovett, 104 F. Supp. 312, 313 (D.D.C. 1952); Dennis v. Lovett, 104 F. Supp. 310 (D.D.C. 1952).

<sup>292</sup>*Id.*

<sup>293</sup>Burns v. Lovett, 104 F. Supp. at 313; Dennis v. Lovett, 104 F. Supp. at 311.

<sup>294</sup>*Id.*

<sup>295</sup>Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952).

<sup>296</sup>*Id.* at 339. The court held that this result was consistent with *Hiatt v. Brown*, which had found: "In this case the court-martial had jurisdiction of the person accused and the offense charged and acted within its lawful powers." 339 U.S. at 111 (emphasis added). Judge Prettyman wrote that the use of the phrase "and acted within its lawful powers," implied a scope of review broader than technical jurisdiction. Burns v. Lovett, 20 F.2d at 339.

<sup>297</sup>*Id.* at 341.

<sup>298</sup>*Id.* at 342.

The rule as we have phrased it includes three propositions. (1) An accused before a court-martial is entitled to a fair trial within due process concepts. (2) The responsibility for insuring such fairness and for determining debatable points is upon the military authorities and their determinations are not reviewable by the courts, except (3) that, in the exceptional case when a denial of a constitutional right is so flagrant as to affect the "jurisdiction" (*i.e.*, the basic power) of the tribunal to render judgment, the courts will review upon petition for *habeas corpus*.<sup>299</sup>

The court proceeded to review in detail each of the arguments made by the petitioners, and concluded that they had not been deprived of due process.<sup>300</sup>

The Supreme Court affirmed the judgment of the lower courts.<sup>301</sup> In a plurality decision,<sup>302</sup> Chief Justice Vinson agreed with the Court of Appeals that the scope of review was broader than simply inquiring into the technical jurisdiction of the courts-martial.<sup>303</sup> He opined, however, that the scope of review on military *habeas corpus* "has always been more narrow than in civil cases."<sup>304</sup> The Court then proceeded to announce the limits of collateral challenges to courts-martial, the so-called "full and fair" consideration test:

The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military

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<sup>299</sup>*Id.*

<sup>300</sup>The court apparently followed a frequent practice used in all capital cases by extensively scrutinizing the records of trial. *Id.* at 347.

Judge Bazelon dissented. He believed that the district court should have conducted an evidentiary hearing into the petitioners' allegations, regardless of their treatment by the military. *Id.* at 353 (Bazelon, J., dissenting). Moreover, he disagreed with the majority's approach of reviewing only "flagrant" errors, since the cumulative effect of non-flagrant errors could be the denial of a fair trial. *Id.* at 348.

<sup>301</sup>*Burns v. Wilson*, 346 U.S. 137 (1953).

<sup>302</sup>Chief Justice Vinson wrote the opinion and was joined by Justices Reed, Burton, and Clark. Justice Jackson concurred in the result without opinion. Justice Minton concurred in the result and wrote a separate opinion discussed below. Justice Frankfurter would neither vote to affirm nor reverse. And Justices Black and Douglas dissented.

<sup>303</sup>*Burns v. Wilson*, 346 U.S. at 139.

<sup>304</sup>*Id.* This is a much criticized portion of the opinion. Chief Justice Vinson only cited *Hiatt v. Brown* for the proposition that the scope of review on military *habeas* is narrower than in civilian cases. Legal scholars note that prior to *Brown*, military and civilian *habeas corpus* roughly paralleled each other. "Thus, it was only in 1950—the year in which Vinson's historical survey began and ended—that the range of issues cognizable on civilian *habeas corpus* became significantly broader than the range on military *habeas*." *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1221.

habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are “final” and “binding” upon all courts (AW-10 USC § 1521(h); UCMJ - USC § 663). We have held before that this does not displace the civil courts’ jurisdiction over an application for habeas corpus from the military prisoner. *Gusik v. Schilder*, 340 U.S. 128 (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence. *Welchel v. McDonald*, 340 U.S. 122 (1950).<sup>305</sup>

The Court held that “had the military courts manifestly refused to consider [the petitioners’] claims, the District Court was empowered to review them *de novo*.”<sup>306</sup> But where, as in the case before it, the military tribunals had entertained every significant allegation of the petitioners, “it is not the duty of the civil courts to simply repeat that process . . . . It is the limited function of the civil courts to determine whether the military has given fair consideration to each of these claims.”<sup>307</sup>

The Court concluded that, “although the Court of Appeals may have erred in reweighing each item of relevant evidence in the trial record, it certainly did not err in holding that there was no need for a further hearing in the District Court.”<sup>308</sup>

In a concurring opinion, Justice Minton believed that the federal courts had no power at all to collaterally review constitutional issues in court-martial. Instead, he opted for the classical limits of inquiry.<sup>309</sup>

Justice Frankfurter neither concurred nor dissented. He believed that the case should be set over until the following term for reargument since there was not sufficient time to review the voluminous records or the ramifications of the issues raised.<sup>310</sup> In a later dissent

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<sup>305</sup>*Burns v. Wilson*, 346 U.S. at 142.

<sup>306</sup>*Id.*

<sup>307</sup>*Id.* at 144.

<sup>308</sup>*Id.* at 146.

<sup>309</sup>*Id.* at 147.

<sup>310</sup>*Id.* at 148-49.

from the Court's refusal to grant a rehearing in *Burns*, he disagreed with Chief Justice Vinson's view that military habeas corpus had always been narrower than habeas review of civilian cases.<sup>311</sup> He saw no reason why the principles enunciated in *Johnson v. Zerbst*<sup>312</sup> should not apply to military prisoners.<sup>313</sup>

Finally, Justice Douglas, joined by Justice Black, dissented. He interpreted the plurality's "full and fair" consideration test to mean that the federal courts must give binding effect to the ruling of a military court on a constitutional question, provided it has given full and fair consideration to it.<sup>314</sup> With this proposition, Justice Douglas disagreed. While conceding that civil courts should not interfere with court-martial convictions where the military had properly applied the constitutional standards established by the Supreme Court, he believed the federal courts should entertain petitions for habeas corpus where the military courts have applied erroneous standards.<sup>315</sup> He noted that "the rules of due process which [the military courts] apply are constitutional rules which we, not they, formulate."<sup>316</sup>

That *Burns* expanded the scope of collateral review of military convictions is readily apparent. To what extent it broadened the scope of review is not entirely clear. The language of the "full and fair" consideration test was not appreciably different than the standard of review followed by the Court in state habeas proceedings beginning with its decision in *Frank v. Mangum*<sup>317</sup> and *Moore v. Dempsey*.<sup>318</sup> It is a test that focuses initially on the adequacy of the military's "corrective processes," rather than upon the merits of a habeas petitioner's constitutional claims.<sup>319</sup>

<sup>311</sup>*Burns v. Wilson*, 346 U.S. 844, 847-49 (Frankfurter, J., dissenting), denying reh'g in 346 U.S. 37 (1953).

<sup>312</sup>304 U.S. 458 (1938).

<sup>313</sup>*Burns v. Wilson*, 346 U.S. 844, 848 (Frankfurter, J., dissenting), denying reh'g in 346 U.S. 137 (1953).

<sup>314</sup>*Burns v. Wilson*, 346 U.S. at 154.

<sup>315</sup>*Id.*

<sup>316</sup>*Id.*

<sup>317</sup>237 U.S. 309 (1915).

<sup>318</sup>261 U.S. 86 (1923).

<sup>319</sup>See, e.g., *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (emphasis added):

Where the state courts have considered and adjudicated the merits of . . . [the petitioner's] contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. . . . But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless.

A number of more recent lower federal court decisions have opined that "*Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions."<sup>320</sup> This position is untenable, especially when the opinion in *Burns* is placed in juxtaposition with the Court's landmark civilian habeas corpus decision in *Brown v. Allen*,<sup>321</sup> issued earlier in the same term.

In *Allen*, the Court discarded the restriction that had precluded federal habeas review of claims fully considered by the state courts.<sup>322</sup> Although the Court acknowledged that a federal district court must take due account of the state proceedings, it held that "the prior state determination of a claim under the United States Constitution cannot foreclose consideration of such a claim" by the federal courts.<sup>323</sup> "It is inadmissible to deny the use of the writ merely because a state court has passed on a Federal constitutional issue."<sup>324</sup> Moreover, the Court held that, while the federal court may accept a state court's determination of factual issues, it cannot accept as binding state adjudications of questions of law:<sup>325</sup> "The state court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."<sup>326</sup>

Thus, while the Court in *Burns v. Wilson* was creating a "full and fair" consideration standard for military habeas cases, it was abandoning a similar standard in *Brown v. Allen* in favor of a widened measure of inquiry. Manifestly, the court in *Burns* intended a narrower standard of review in military habeas corpus proceedings.<sup>327</sup>

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<sup>320</sup>*Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970). See also *Hatheway v. Secretary of the Air Force*, 641 F.2d 1376, 1380 (9th Cir.), cert. denied, 454 U.S. 864 (1981); *Allen v. Van Cantfort*, 436 F.2d 625, 629-30 (1st Cir.), cert. denied, 402 U.S. 1008 (1971).

<sup>321</sup>344 U.S. 443 (1953).

<sup>322</sup>See *Bator*, *supra* note 206, at 499-500; *Rosenn*, *supra* note 34, at 348-50; *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1056-57.

<sup>323</sup>*Brown v. Allen*, 344 U.S. at 500 (Frankfurter, J.).

<sup>324</sup>*Id.* at 513.

<sup>325</sup>*Id.* at 506.

<sup>326</sup>*Id.* at 508.

<sup>327</sup>It is true that only a plurality of the Court joined in the adoption of the "full and fair" consideration test. A majority of the Court, however, including Justice Minton, see *supra*, note 309 and accompanying text, opted for a scope of review of military convictions that was narrower than afforded state habeas petitioners.



### **E. POST-BURNS v. WILSON REVIEW: THE DIVERGENCE OF THE LOWER COURTS**

As discussed above, *Burns* was greeted with confusion.<sup>328</sup> While most courts had little difficulty in applying the "full and fair" consideration test to the factual determinations of military courts, many chafed at having to acquiesce in the military's resolution of legal issues. After all, as Justice Douglas noted in his dissent in *Burns*,<sup>329</sup> this was the domain of the federal courts and not of the military. In essence, the courts could not agree on what their responsibilities were under the *Burns* standard of review. The result was a divergence in the approaches taken by the various lower federal courts; this division has yet to be rectified by the Supreme Court. Except for Court's decision in *United States v. Augenblick*,<sup>330</sup> in which it held that collateral review of courts-martial is limited to issues of constitutional dimension, the Supreme Court has given little guidance in this area.<sup>331</sup>

It is somewhat puzzling why the federal courts should have experienced so much confusion over the meaning of *Burns*. The *Burns* standard of "full and fair" consideration was not a new concept. It did not appreciably differ from the standard applied by the federal courts in state habeas proceedings from the time of the Supreme

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<sup>328</sup>See *supra*, note 17 and accompanying text. "[*Burns*] has meant many things to many courts." *Kaufmann v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970). See also *Bisson v. Howard*, 224 F.2d 586, 590 (5th Cir.), *cert. denied*, 350 U.S. 916 (1955).

<sup>329</sup>*Burns v. Wilson*, 346 U.S. at 154.

<sup>330</sup>393 U.S. 348 (1969).

<sup>331</sup>In *Fowler v. Wilkinson*, 353 U.S. 583 (1957), the Court indicated its reliance on *Burns* in rejecting a petitioner's claim regarding the harshness of his sentence, but provided no guidance for its application. Similarly, in *Parker v. Levy*, 417 U.S. 733 (1974), the Supreme Court fully reviewed the plaintiff's attack on the constitutionality of Articles 133 and 134, Uniform Code of Military Justice [hereinafter cited as UCMJ]. With regard to his other claims, however, the Court cryptically noted that the Court of Appeals first must determine whether they are reviewable under *Burns*. *Id.* at 762. In other decisions, the Court has reviewed constitutional claims without any mention of a proper scope of view. See, e.g., *Middendorf v. Henry*, 425 U.S. 25 (1976) (application of Sixth Amendment to summary courts-martial). Other decisions of the Court during this period have dealt exclusively with questions of technical jurisdiction, which historically have been subject to plenary review. See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (subject-matter jurisdiction); *Gosa v. Mayden*, 413 U.S. 665 (1973) (subject-matter jurisdiction); *Relford v. Commandant*, 401 U.S. 355 (1971) (subject-matter jurisdiction); *O'Callahan v. Parker*, 395 U.S. 258 (1969) (subject-matter jurisdiction); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (personal jurisdiction); *Lee v. Madigan*, 358 U.S. 228 (1958) (subject-matter jurisdiction); *Reid v. Covert*, 354 U.S. 1 (1957) (personal jurisdiction); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (personal jurisdiction).



Court's decisions in *Frank* and *Moore* to its decision in *Brown v. Allen*. Thus, for nearly 40 years the federal courts had applied a similar standard of review in civilian habeas cases.

In any event, since *Burns*, the federal courts have been unable to agree on a uniform scope of collateral review of military convictions. Indeed, it is sometimes difficult to reconcile the various standards applied within individual courts.<sup>332</sup> Although generalizations are dangerous, the approaches taken by the federal courts roughly fall into four broad categories.

First, several early courts, finding no apparent constitutional infirmities, expressly avoided reaching the issue of the proper scope of review under *Burns*.<sup>333</sup> Second, in what was the prevailing view until about 1970, many federal courts strictly applied the apparent meaning of the *Burns* test and refused to review either the factual or legal merits of constitutional claims litigated in the military courts. Stated another way, this approach focused on whether the military courts "manifestly refused" to consider a petitioner's constitutional claims.<sup>334</sup>

Third, some courts, notably the Court of Claims, and now the Court of Appeals for the Federal Circuit, use a fact-law dichotomy in applying *Burns*. The courts will not review factual issues "fully and fairly" considered by the military, but will review legal determinations *de novo*. For example, in its recent decision in *Bowling v. United States*,<sup>335</sup> the Federal Circuit refused to reevaluate the evidentiary determinations made by the military courts with regard to the impartiality of a commander who had authorized a search, the

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<sup>332</sup>Compare *Kehrli v. Sprinkle*, 524 F.2d 328 (10th Cir. 1975), *cert. denied*, 426 U.S. 927 (1976), and *Levy v. Parker*, 478 F.2d 772, (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 733 (1974), with *Angle v. Laird*, 429 F.2d 892 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971), and *United States ex rel. Thompson v. Parker*, 399 F.2d 774, 775-76 (3d Cir. 1968), *cert. denied*, 393 U.S. 1059 (1969).

<sup>333</sup>See, e.g., *Kasey v. Goodwyn*, 291 F.2d 174 (4th Cir. 1961); *Bisson v. Howard*, 224 F.2d 586, 590 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955).

<sup>334</sup>See, e.g., *Kehrli v. Sprinkle*, 524 F.2d 328 (10th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); *United States ex rel. Thompson v. Parker*, 399 F.2d 774 (3d Cir. 1968), *cert. denied*, 393 U.S. 1059 (1969); *Palomera v. Taylor*, 344 F.2d 937 (10th Cir. 1965); *Gorko v. Commanding Officer*, 314 F.2d 858 (10th Cir. 1963); *McKinney v. Warden*, 273 F.2d 643 (10th Cir. 1959), *cert. denied*, 363 U.S. 816 (1960); *Bennett v. Davis*, 267 F.2d 15 (10th Cir. 1959); *Thomas v. Davis*, 249 F.2d 232 (10th Cir. 1957); *Bourchier v. Van Metre*, 223 F.2d 646 (D.C. Cir. 1955); *Suttles v. Davis*, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954); *Easley v. Hunter*, 209 F.2d 483 (10th Cir. 1953); *Swisher v. United States*, 237 F. Supp. 921 (W.D. Mo. 1965), *aff'd*, 354 F.2d 472 (8th Cir. 1966); *Begalke v. United States*, 286 F.2d 606 (Ct. Cl.), *cert. denied*, 364 U.S. 865 (1960).

<sup>335</sup>713 F.2d 1558 (Fed. Cir. 1983), *aff'd* 552 F. Supp. 54 (Cl. Ct. 1982).

existence of probable cause to support a search authorization, and the sufficiency of the evidence to support a finding of guilty. On the other hand, in *McDonald v. United States*,<sup>336</sup> the court reviewed and rejected on the merits a challenge to the constitutional validity of the multiple roles of the convening authority in court-martial proceedings, an abstract legal issue not dependent upon factual determinations.<sup>337</sup>

Finally, most courts now have either developed their own standards for collateral review of constitutional claims or simply review such claims without any apparent qualification. In these cases, the courts either cite and distinguish *Burns* or, increasingly, ignore it all together.

The first case to totally break with *Burns* was *Application of Stapley*,<sup>338</sup> in which a Utah district court released a military prisoner on the ground that the prisoner had been denied effective assistance of counsel at his special court-martial. The court conducted a plenary hearing on the issue and made only an enigmatic reference to *Burns* in a footnote of the opinion.<sup>339</sup> Similarly, the First Circuit, in *Ashe v. McNamara*,<sup>340</sup> reviewed a claim of ineffective assistance of counsel on its merits, without reference to whether it was fully and fairly considered by the military courts.<sup>341</sup>

<sup>336</sup>531 F.2d 490 (Ct. Cl. 1976) (per curiam).

<sup>337</sup>See also *Levy v. Parker*, 478 F.2d 772 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 733 (1974); *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967); *Marymount v. Joyce*, 352 F. Supp. 547 (W.D. Ark. 1972); *Sweet v. Taylor*, 178 F. Supp. 456 (D. Kan. 1959); *White v. Humphrey*, 115 F. Supp. 317 (M.D. Pa. 1953), *aff'd*, 212 F.2d 503 (3rd Cir.), *cert. denied*, 348 U.S. 900 (1954); *Juhl v. United States*, 383 F.2d 1009 (Ct. Cl. 1967), *rev'd on other grounds sub nom. United States v. Augenblick*, 393 U.S. 348 (1969); *Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969); *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966).

<sup>338</sup>246 F. Supp. 316 (D. Utah 1965). The government never appealed. *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1217 n.61.

<sup>339</sup>*Application of Stapley*, 246 F. Supp. at 321 n.1.

<sup>340</sup>355 F.2d 277 (1st Cir. 1965).

<sup>341</sup>One issue raised in *Ashe*, which was the source of controversy until *Schlesinger v. Councilman*, 420 U.S. 738 (1975), was the effect of Article 76, UCMJ, 10 U.S.C. § 876, on non-habeas challenges to military convictions. The Government argued in a number of cases that Article 76—the finality provision of the Code—barred all but habeas attacks on courts-martial. In 1950, the Supreme Court decided that Article 76's predecessor, Article of War 53, did not bar habeas proceedings. *Gusik v. Schilder*, 340 U.S. 128 (1950). And the federal courts generally rejected the contention that Article 76 barred other kinds of collateral relief. See, e.g., *Parker v. Levy*, 478 F.2d 772, 779 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 733 (1974); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 994 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); *Augenblick v. United States*, 377 F.2d 586, 591-93 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969). But see *United States v. Carney*, 406 F.2d 1328 (2d Cir. 1969). In *Councilman*, the Supreme Court settled the issue by holding that Article 76 does not bar non-habeas forms of collateral review. *Schlesinger v. Councilman*, 420 U.S. at 752-53.

The prevailing scope of collateral review of court-martial convictions is reflected in *Kauffman v. Secretary of the Air Force*.<sup>342</sup> In *Kauffman*, the District of Columbia Circuit held that "the scope of review of military judgments should be the same as that in habeas corpus review of state or federal convictions . . . ."<sup>343</sup> The Court rejected the notion that it could not review issues "fully and fairly" considered by the military. In an opinion reminiscent of Justice Douglas' dissent in *Burns*, the court held that the district judge erred by not reviewing the merits of the constitutional claims raised in a collateral attack on a military conviction:

The District Court below concluded that since the Court of Military Appeals gave thorough consideration to appellant's constitutional claims, its consideration was full and fair. It did not review the constitutional rulings of the Court of Military Appeals and find them correct by prevailing Supreme Court standards. This was error. We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. . . . The benefits of collateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails, on the one hand, to protect the rights of servicemembers and, on the other, to articulate and defend the needs of the services as they affect those rights.<sup>344</sup>

Generally, most courts will now conduct a *de novo* review of constitutional claims in collateral proceedings without considering the

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<sup>342</sup>415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970).

<sup>343</sup>*Id.* at 992.

<sup>344</sup>*Id.* at 997 (footnote omitted).

prior determinations of the military courts.<sup>345</sup> Some structure their constitutional analysis to the unique requirements of the military<sup>346</sup> or, on occasion, give deference to constitutional standards developed by the military courts.<sup>347</sup> Other courts apply their own constitutional views to the cases.<sup>348</sup> Moreover, while many courts limit their review to legal, as opposed to factual, issues involving constitutional questions, an increasing number reweigh the evidence adduced in the court-martial proceedings, or conduct their own hearings, and second-guess the military tribunals in their factual

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<sup>345</sup>See, e.g., *Schlomann v. Ralston*, 691 F.2d 401 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1229 (1983); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Curry v. Secretary of the Army*, 595 F.2d 873 (D.C. Cir. 1979); *Curci v. United States*, 577 F.2d 815 (2d Cir. 1978); *Priest v. Secretary of the Navy*, 570 F.2d 1013 (D.C. Cir. 1977); *Culver v. Secretary of the Air Force*, 559 F.2d 622 (D.C. Cir. 1977); *Baker v. Schlesinger*, 523 F.2d 1031 (6th Cir. 1975); *Homcy v. Resor*, 455 F.2d 1345 (1971); *Owings v. Secretary of the Air Force*, 447 F.2d 1245 (D.C. Cir. 1971); *Allen v. Van Cantfort*, 436 F.2d 625 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965). *Cf. Temple v. Orr*, 580 F. Supp. 1111 (M.D. Tenn. 1984) (application of "arbitrary and capricious" standard to military correction board review of court-martial).

While adhering to *Burns*, at least insofar as factual determinations are concerned, the Courts of Appeal for the Third and Federal Circuits similarly will review constitutional claims. See *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983); *Levy v. Parker*, 478 F.2d 772 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 734 (1974). The Tenth Circuit, in which most habeas corpus petitions are filed because of the location of the United States Disciplinary Barracks at Fort Leavenworth, Kansas, see *Strassburg*, *supra* note 29, at 27, still strictly adheres to the *Burns*' "full and fair" consideration test, although its decisions are not entirely consistent. See *Kehrli v. Sprinkle*, 524 F.2d 328, 331 (10th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); *Edgar v. Nix*, No. 80-3148, slip op. at 2-3 (D. Kan. Nov. 23, 1981). See also note 332 *supra*. The Fifth and Eleventh Circuits likely will follow the decision in *Calley v. Callaway*, 519 F.2d 184 (5th Cir.) (en banc), *cert. denied*, 425 U.S. 911 (1975), discussed below. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (Fifth Circuit decisions rendered before October 1, 1981, binding on Eleventh Circuit). The Fourth and Seventh Circuits have not recently rendered decisions in this area.

<sup>346</sup>See, e.g., *Middendorf v. Henry*, 425 U.S. 25 (1976) (right to counsel at summary courts-martial); *Parker v. Levy*, 417 U.S. 733 (1974) (constitutionality of Articles 133 & 134, UCMJ); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) (constitutionality of Article 125, UCMJ); *Curry v. Secretary of the Army*, 595 F.2d 873 (D.C. Cir. 1979) (constitutionality of convening authority's multiple roles); *Priest v. Secretary of the Navy*, 570 F.2d 1013 (D.C. Cir. 1977) (First Amendment rights); *Culver v. Secretary of the Air Force*, 559 F.2d 1013 (D.C. Cir. 1977) (First Amendment rights).

<sup>347</sup>See, e.g., *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Brown v. United States*, 508 F.2d 618 (3d Cir. 1974); *Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972). See generally *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

<sup>348</sup>See, e.g., *Curci v. United States*, 577 F.2d 815 (2d Cir. 1978); *Baker v. Schlesinger*, 523 F.2d 1031 (6th Cir. 1975); *Angle v. Laird*, 429 F.2d 892 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971).

determinations.<sup>349</sup> Finally, few, if any, of these courts have acknowledged any continued validity in the *Burns* decision.<sup>350</sup>

While generalizations are difficult since each court has seemingly cut its own path in this area, two conclusions can be drawn from these decisions. First, unless the Supreme Court revives it, the *Burns* "full and fair" consideration test is no longer good law in most circuits. It has been abandoned by nearly all federal courts. Second, except for limiting their review, in most cases, to constitutional issues, few courts articulate any meaningful restraint on the scope of their collateral inquiry. Especially in cases where the courts undertake extensive examination of factual questions, there is little to distinguish these collateral attacks from direct appeals.

The Fifth Circuit, in *Calley v. Callaway*,<sup>351</sup> attempted to bridge the gap between *Burns* and *Kauffman* and strike a balance between the independence of the military justice system and the responsibility of the federal civilian judiciary for "constitutional decision-making."<sup>352</sup>

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<sup>349</sup>See, e.g., *Schlomann v. Ralston*, 691 F.2d 401 (8th Cir. 1982) (suggested district court should independently review record of trial, and make own determination of accused's competency to stand trial), *cert. denied*, 103 S.Ct. 1229 (1983); *Owings v. Secretary of the Air Force*, 447 F.2d 1245 (D.C. Cir. 1971) (reweighed evidence to determine its sufficiency); *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971) (examined evidence of command influence); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965) (examined evidence of counsel's conflict of interest); *Juhl v. United States*, 383 F.2d 1000 (Ct. Cl. 1967), *rev'd on other grounds sub nom. United States v. Augenblick*, 393 U.S. 348 (1969) (weighed credibility of witnesses' testimony); *Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969) (weighed witnesses' credibility); *Rutledge v. Johnson*, No. 81-70204, slip op. at 3-6 (E.D. Mich. May 5, 1981) (weighed evidence).

<sup>349</sup>See, e.g., *Schlomann v. Ralston*, 691 F.2d 401 (8th Cir. 1982) (suggested district court should independently review record of trial, and make own determination of accused's competency to stand trial), *cert. denied*, 103 S.Ct. 1229 (1983); *Owings v. Secretary of the Air Force*, 447 F.2d 1245 (D.C. Cir. 1971) (reweighed evidence to determine its sufficiency); *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971) (examined evidence of command influence); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965) (examined evidence of counsel's conflict of interest); *Juhl v. United States*, 383 F.2d 1000 (Ct. Cl. 1967), *rev'd on other grounds sub nom. United States v. Augenblick*, 393 U.S. 348 (1969) (weighed credibility of witnesses' testimony); *Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969) (weighed witnesses' credibility); *Rutledge v. Johnson*, No. 81-70204, slip op. at 3-6 (E.D. Mich. May 5, 1981) (weighed evidence).

<sup>350</sup>The few courts that mention the *Burns* "full and fair" consideration test refuse to follow it. See, e.g., *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Allen v. Van Cantfort*, 436 F.2d 625 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971); *Kaufmann v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970).

<sup>351</sup>519 F.2d 184 (5th Cir.) (en banc), *cert. denied*, 425 U.S. 911 (1975).

<sup>352</sup>*Schlesinger v. Councilman*, 420 U.S. 738, 765 (1975) (Brennan, J., dissenting).

Lieutenant William Calley was convicted by general court-martial of "the premeditated murder of not fewer than 22 Vietnamese of undetermined age and sex, and of assault with intent to murder one Vietnamese child."<sup>353</sup> He was sentenced, *inter alia*, to life imprisonment. Although his conviction was sustained after extensive reviews by the convening authority, the military courts,<sup>354</sup> the Secretary of the Army, and the President, Calley's sentence was reduced to confinement for 10 years.<sup>355</sup> Claiming violations of a number of rights in the military proceedings, Calley sought habeas relief in the federal courts. The district court granted relief on four grounds: that prejudicial pretrial publicity deprived Calley of an opportunity for a fair and impartial trial, that the military judge's failure to subpoena certain witnesses denied Calley of his right to confrontation and compulsory process and deprived him of due process, that the refusal of the House of Representatives to release certain testimony taken in executive session deprived Calley of due process, and that the charges, specifications, and bill of particulars did not adequately inform Calley of the charges against him nor adequately protect him from possible double jeopardy.<sup>356</sup>

On appeal, the Fifth Circuit established a structured analysis for collateral review of courts-martial similar in nature to the analysis it developed for military administrative decisions in *Mindes v. Seaman*.<sup>357</sup> After extensively examining the case law, the court concluded that the power of a federal court to collaterally review military convictions is dependent upon the nature of the issue raised "and in this determination, four principal inquiries are necessary":<sup>358</sup>

First, the error reviewed must be of constitutional dimension, or be an error so fundamental as to have resulted in a "gross miscarriage of justice."<sup>359</sup>

Second, the issue raised "must be one of law than of disputed fact already determined by the military tribunals."<sup>360</sup>

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<sup>353</sup>Calley v. Callaway, 519 F.2d at 190.

<sup>354</sup>United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973).

<sup>355</sup>Calley v. Callaway, 519 F.2d at 190.

<sup>356</sup>*Id.* at 194.

<sup>357</sup>453 F.2d 197 (5th Cir. 1971).

<sup>358</sup>Calley v. Callaway, 519 F.2d at 199.

<sup>359</sup>*Id.* at 200.

<sup>360</sup>*Id.*



Third, "military considerations may warrant different treatment of constitutional claims."<sup>361</sup> In this regard, the court observed that, where an accused's constitutional claim has been resolved by the military courts and the military courts conclude that the accused's position, if accepted, would impair the military mission, "the federal courts should not substitute their judgment for that of the military courts."<sup>362</sup> The court opined that this result was mandated by the different character of the military community, and the constitutionally-based independence of the military judicial system.<sup>363</sup>

Finally, "military courts must give adequate consideration to the issues involved and apply proper legal standards."<sup>364</sup> In other words, while decisions of the military courts normally are entitled to a "healthy respect," a necessary prerequisite of that respect is that they apply proper legal standards to disputed factual claims.<sup>365</sup>

Applying its analysis to the constitutional claims raised by Calley, the Fifth Circuit reversed the order of the district court granting him habeas relief.<sup>366</sup>

As will be discussed in greater detail below, the analytical framework for collateral review developed by the Fifth Circuit in *Calley* offers a sound compromise between unswerving adherence to the *Burns* "full and fair" consideration test and plenary review of military criminal proceedings. By properly limiting review to legal issues of constitutional importance,<sup>367</sup> *Calley* insures that the federal courts will not become appellate tribunals over the military justice system, reviewing claims of procedural errors in court-martial proceedings. Moreover, by giving deference to the factual and legal determinations of military tribunals, *Calley* maintains the delicate balance between the rights of the accused and the needs of the military, as well as between the federal judiciary and the military courts.

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<sup>361</sup>*Id.* (emphasis omitted).

<sup>362</sup>*Id.* at 200-01.

<sup>363</sup>*Id.* at 201-02.

<sup>364</sup>*Id.* at 203 (emphasis omitted).

<sup>365</sup>*Id.*

<sup>366</sup>*Id.* at 203-28. Five of the 13 judges on the court dissented with the majority's treatment of the merits of Calley's argument that he had been deprived of due process because Congress withheld testimony given in executive session. *Id.* at 228-32. The dissenters fully concurred, however, with the standard for review advanced in the majority's decision. *Id.* at 228-29.

<sup>367</sup>See *United States v. Augenblick*, 393 U.S. 348 (1969).

Unfortunately, unlike their response to *Mindes*,<sup>368</sup> the federal courts have virtually ignored the *Calley* decision and none have adopted its structured inquiry. Instead, most have continued to apply what is little more than an *ad hoc* approach to review.<sup>369</sup> As a consequence, after nearly two centuries of certainty, it is now virtually impossible to predict with any degree of confidence the scope of review most federal courts will apply in any particular case.

How did the present disharmony among the federal courts come about? As recently as 1968, the *Burns* "full and fair" consideration test was deemed "'the law of the land,'"<sup>370</sup> and was applied by the overwhelming majority of federal courts. What caused its demise within such a relatively short period of time? Several factors likely are responsible.

First, the federal courts were never particularly receptive to the *Burns* approach. Many were confused by it;<sup>371</sup> a few were hostile.<sup>372</sup> This dissatisfaction was further fueled by the intense criticism to which *Burns* was subjected in the academic community<sup>373</sup> and by the increased mistrust of the military justice system—and all things military—that came with the Vietnam War.<sup>374</sup>

Second, the Supreme Court never clarified its approach in *Burns*; indeed, the Court never applied *Burns* again. Moreover, subsequent decisions of the Court cast doubt on the continued vitality of the "full and fair" consideration test. Justice Douglas' opinion for the Court in *Augenblick* suggested that the question of the scope of review was left open in *Burns*.<sup>375</sup> The Court, in *Parker v. Levy*, made

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<sup>368</sup>See, e.g., *Gonzales v. Department of Army*, 718 F.2d 927 (9th Cir. 1983); *Rucker v. Secretary of the Army*, 702 F.2d 966 (11th Cir. 1983); *Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981); *West v. Brown*, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978). But see *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981).

<sup>369</sup>See notes 345-50 *supra*, and accompanying text.

<sup>370</sup>*United States ex rel. Thompson v. Parker*, 399 F.2d 774, 776 (3d Cir. 1968), cert. denied, 393 U.S. 1059 (1969), quoting *Swisher v. United States*, 237 F. Supp. 921, 928 (W.D. Mo. 1965), *aff'd*, 354 F.2d 472 (8th Cir. 1966). See also *Katz & Nelson*, *supra* note 17, at 208; *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1218; Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 388 (1966).

<sup>371</sup>See notes 17, 328 *supra*.

<sup>372</sup>See, e.g., *Rushing v. Wilkinson*, 272 F.2d 633, 641 (5th Cir. 1959), cert. denied, 364 U.S. 914 (1960).

<sup>373</sup>See *Calley v. Callaway*, 519 F.2d 184, 198 n.20 (5th Cir.), cert. denied, 425 U.S. 911 (1975).

<sup>374</sup>Comment, *Civilian Court Review of Court-Martial Adjudications*, 69 Colum. L. Rev. 1259, 1262 (1969).

<sup>375</sup>*United States v. Augenblick*, 393 U.S. 348, 351 (1969). See also *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1380 (9th Cir.), cert. denied, 454 U.S. 864 (1981).

a cryptic reference to the application of *Burns*,<sup>376</sup> but it fully reviewed Captain Levy's constitutional challenge to Articles 133 and 134.<sup>377</sup>

Finally, during the 1960s, the Court greatly expanded the use of habeas corpus in the civilian sector. As discussed above, the Court's decision in *Brown v. Allen*<sup>378</sup> was to civilian habeas corpus what *Burns* was to habeas relief in the military. *Allen* had held that, even where state courts fully consider federal constitutional issues raised in habeas corpus proceedings, the federal courts could consider them anew.<sup>379</sup> The Court observed, however, that when the state record is adequate and the federal court is satisfied that the state courts have fairly considered federal constitutional claims, the federal court may, absent unusual circumstances, dispense with a hearing.<sup>380</sup>

Nine years after *Brown v. Allen*, civilian habeas corpus reached its zenith. In *Townsend v. Sain*,<sup>381</sup> the Court "radically changed the character of the habeas review function"<sup>382</sup> by requiring federal courts to independently "review state court decisions on constitutional issues, and to relitigate questions of fact whenever 'there is some indication that the state process has not dealt fairly or completely with the issues.'"<sup>383</sup> The same day it decided *Townsend*, the Court issues its opinion in *Fay v. Noia*,<sup>384</sup> which required federal habeas review of issues not raised in state proceedings, unless the petitioner had "deliberately by-passed the orderly procedure of the state courts."<sup>385</sup>

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<sup>376</sup>417 U.S. 733, 762 (1974).

<sup>377</sup>*Id.* at 743-61. See note 331 *supra*. One commentator has suggested that the Court's failure to address the Third Circuit's interpretation of *Burns*, coupled with its own review of the constitutional issues raised, is evidence of the Court's rejection of the "full and fair" consideration test. The precedential value of *Levy* is minimal, however, in light of the deference the Court gave to the military and because of its failure to lay down any other guidelines for review. Note, *Civilian Review of Military Habeas Corpus Petitions: Is Justice Being Served?*, 44 Fordham L. Rev. 1228, 1237-38 (1976).

<sup>378</sup>344 U.S. 443 (1953).

<sup>379</sup>*Id.* at 457-58.

<sup>380</sup>*Id.* at 463.

<sup>381</sup>372 U.S. 293 (1963).

<sup>382</sup>Rosenn, *supra* note 34, at 352.

<sup>383</sup>*Id.* at 351 (quoting *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1122). The relitigation of factual issues under *Townsend* was much criticized, and ultimately was curtailed by an amendment to the habeas corpus statute in 1966: 28 U.S.C. § 2254(d). See Rosenn, *supra* note 34, at 354. The statute requires federal habeas courts to presume state factual findings are correct, except under the exceptional circumstances listed in the statute. See Note, *Sumner v. Mata: Muddying the Waters of Federal Habeas Corpus Court Deference to State-Court Findings*, 1983 Wis. L. Rev. 751.

<sup>384</sup>372 U.S. 391 (1963).

<sup>385</sup>*Id.* at 438.

*Townsend* and *Noia* represented a watershed in federal civilian habeas jurisprudence and, "although severely criticized, remained in effect for the next decade."<sup>386</sup> Just as the developments in the law of civilian habeas corpus before World War II had influenced military habeas review, the expansion of the writ in the 1960s undoubtedly colored the lower federal court's perception of the proper scope of its application in the military sphere.<sup>387</sup>

Unfortunately, the result of the federal courts' repudiation of *Burns* has not been the evolution of a new standard of collateral inquiry; except for a few instances, there is no clearly articulated standard of review. Manifestly, the absence of a structured basis for collaterally reviewing military convictions is not desirable to the claimants, the federal courts, or the military justice system. A uniformly applied measure of review, which balances the interests of all three, is needed. Before discussing a possible solution, two tangential, but interrelated, issues must be briefly examined, the doctrines of exhaustion of remedies and waiver.

### III. THE PERIPHERAL ISSUES: THE DOCTRINES OF EXHAUSTION AND WAIVER

The doctrines of exhaustion of remedies and of waiver necessarily are intertwined with the collateral review of military convictions. The doctrine of exhaustion is one of timing; its application does not preclude federal court review, but merely postpones it until a claimant has pursued available remedies in the military justice system. The doctrine requires that objections to courts-martial be raised in the military trial and any available appellate remedies, including extraordinary proceedings, before collateral relief is sought in the federal courts.<sup>388</sup> The doctrine of waiver, on the other hand, is one of forfeiture; where a claimant fails to raise an issue in military court proceedings, he is barred from raising the issue in a subsequent collateral challenge in the federal courts.<sup>389</sup> Waiver generally entails a procedural default. The doctrine arises where the failure to assert an issue during the course of military proceedings precludes subsequent adjudication of the issue in a military forum.

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<sup>386</sup>Rosenn, *supra* note 34, at 354.

<sup>387</sup>See, e.g., *Augenblick v. United States*, 377 F.2d 586, 593 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969).

<sup>388</sup>See generally *Fay v. Noia*, 372 U.S. 391, 420 (1963); *Ex parte Royall*, 117 U.S. 241, 252-53 (1886).

<sup>389</sup>See generally *Fay v. Noia*, 372 U.S. at 424-26.

## A. THE DOCTRINE OF EXHAUSTION OF REMEDIES

Prior to 1950, exhaustion of military remedies was not a prerequisite to collateral review in the civilian courts. If a service member challenged the jurisdiction of a court-martial, whether pending or complete, the court would entertain his petition for habeas corpus; if the court determined that the court-martial lacked jurisdiction, the service member would be ordered released. Exhaustion was not an issue; if the military court was without jurisdiction, it simply could not proceed.<sup>300</sup> By contrast, in *Ex parte Royall*,<sup>301</sup> the first case reaching the Supreme Court from a state habeas petitioner, the Court required exhaustion of state remedies.

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<sup>300</sup>See, e.g., *Billings v. Truesdell*, 321 U.S. 542 (1944) (improper induction); *Morrissey v. Perry*, 137 U.S. 157 (1980) (minor); *Smith v. Whitney*, 116 U.S. 167 (1886) (writ of prohibition); *United States ex rel. Pasela v. Fenno*, 167 F.2d 593 (2d Cir.), cert. denied, 335 U.S. 806 (1948) (reservist); *United States v. Bullard*, 290 F. 705 (2d Cir. 1923) (inductee); *United States ex rel. Harris v. Daniels*, 279 F. 844 (2d Cir. 1922) (jurisdiction over offense); *Ex parte Thieret*, 268 F. 472 (6th Cir. 1920) (inductee); *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919) (civilian); *Hoskins v. Pell*, 239 F. 279 (5th Cir. 1917) (minor); *Hoskins v. Dickerson*, 239 F. 275 (5th Cir. 1917) (minor); *In re Miller*, 114 F. 838 (5th Cir. 1902) (minor); *Soloman v. Davenport*, 87 F. 318 (4th Cir. 1898) (minor); *Ex parte Rock*, 171 F. 240 (C.C.N.D. Ohio 1909) (minor); *In re Carver*, 142 F. 623 (C.C.D. Me. 1906) (minor); *In re Cadwallader*, 127 F. 881 (C.C.E.D. Mo. 1904) (statute of limitations); *Ex parte Reaves*, 121 F. 848 (C.C.M.D. Ala.), rev'd sub nom. *United States v. Reaves*, 126 F. 127 (5th Cir. 1903) (minor); *In re Carver*, 103 F. 624 (C.C.D. Me. 1900) (minor); *United States v. Maney*, 61 F. 140 (C.C.D. Minn. 1894) (writ of prohibition); *Ex parte Van Vranken*, 47 F. 888 (C.C.D. Va. 1891), rev'd, U.S. 694 (1895) (paymaster's clerk); *In re Kaufman*, 41 F. 876 (C.C.D. Md. 1890) (minor); *In re Cosenow*, 37 F. 668 (C.C.E.D. Mich. 1889) (minor); *In re Zimmerman*, 30 F. 176 (C.C.N.D. Cal. 1887) (statute of limitations, minor); *In re Baker*, 23 F. 30 (C.C.D.R.I. 1885) (minor); *In re Davison*, 21 F. 618 (C.C.S.D.N.Y. 1884) (statute of limitations, minor); *In re White*, 17 F. 723 (C.C.D. Cal. 1883) (statute of limitations); *United States ex rel. Marino v. Hildreth*, 61 F. Supp. 667 (E.D.N.Y. 1945) (fraudulent discharge); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943) (civilian); *Ex parte Kerekes*, 274 F. 870 (E.D. Mich. 1921) (inductee, alien); *Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921) (minor); *Ex parte Goldstein*, 268 F. 431 (D. Mass. 1920) (inductee); *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920), appeal dismissed, 256 U.S. 705 (1921) (spy); *Ex parte Falls*, 251 F. 415 (D.N.J. 1918) (civilian); *Ex parte Foley*, 243 F. 470 (W.D. Ky. 1917) (minor); *Ex parte Lisk*, 145 F. 860 (E.D. Va. 1906) (fraudulent enlistment); *In re Corbett*, 6 F. Cas. 527 (E.D.N.Y. 1877) (no. 3,219) (unlawful pretrial confinement).

<sup>301</sup>117 U.S. 241 (1886).

This is not to say that recourse to military remedies was never discussed;<sup>392</sup> it was.<sup>393</sup> But the courts did not require a habeas petitioner challenging the jurisdiction of a military tribunal to first present his claim to the very tribunal he asserted had no lawful basis to proceed. In *Smith v. Whitney*,<sup>394</sup> a case decided the same year as

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<sup>392</sup>Of course, prior to the enactment of the Uniform Code of Military Justice, military appellate remedies were not nearly as sophisticated as they are today. Before 1920, the two principal forms of appellate review were by the convening authority, usually referred to as the reviewing authority, and, in certain cases, by the President or some other superior officer, usually referred to as the confirming authority. Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15, 25-26 (1949).

Experience with the Articles of War in World War I induced changes in appellate review of courts-martial, which were enacted in 1920, and included such innovations as the post-trial review and the board of review. *Id.* at 43-44, 46-47. In 1919, a bill was introduced to provide for a three-judge civilian court of military appeals, but was rejected. *Id.* at 43. The opinions of the board of review, which was composed of at least three officers of The Judge Advocate General's Department, were advisory only, *id.* at 47-52, but its procedures were similar to that of civilian appellate courts. *Id.* at 52-53. Only serious sentences, such as death and the dismissal of officers, were submitted to the board for opinion; other sentences were approved by the reviewing authority. *Id.* 46-47. In those cases referred to the board, the President ultimately approved the sentences. *Id.* at 47-52.

During World War II, branch offices of The Judge Advocate General were established in the European, North African (later Mediterranean), and China-Burma-India Theaters of Operations, and the United States Army Forces in the Pacific Ocean Area. *Id.* at 54. The commanders of these theaters were empowered to confirm certain sentences that previously could only be approved by the President. *Id.* Each theater had its own appellate board of review. *Id.* Sentences of dismissal and death for crimes other than murder, rape, mutiny, desertion, and spying, were sent to the President for review, following approval by the theater commander. *Id.* at 54-55.

The appellate procedures underwent further change following World War II. The boards of review were retained, and a new judicial tribunal, the Judicial Council, composed of three general officers of the Judge Advocate General's Corps, was created. *Id.* at 62. The Judicial Council was empowered to confirm such sentences as life imprisonment, dismissal of officers below the rank of brigadier general, and dismissal of cadets. *Id.* at 63. The new articles also authorized The Judge Advocate General to grant new trials, vacate sentences, restore rights, privileges, and property affected by sentences, and substitute for dismissals, dishonorable discharges, or bad conduct discharges already executed a form of discharge implying no dishonor. This power was to be exercised upon application of the service member within one year after final disposition of his case upon final appellate review. *Id.* at 68. See Article of War 53, 10 U.S.C. § 1525 (Supp. III 1949).

<sup>393</sup>For example, in *Ex parte Anderson*, 16 Iowa 595 (1864), the court denied a petition for habeas corpus filed for the release of a minor pending court-martial for desertion. The court declared that the validity of the service member's enlistment was for the military tribunal to decide, and that the service member must abide by the decision of the court-martial before the question of the validity of the enlistment could be determined in the civil courts by habeas corpus. *Id.* at 599.

Similarly, in *Wales v. Whitney*, 144 U.S. 564 (1885), the court denied habeas relief to the former Surgeon General of the Navy, Wales, against whom court-martial charges were pending. Although the Court's decision was based on the absence of habeas jurisdiction because Wales was not in custody, it noted that the military authorities could resolve, during the court-martial, the issues Wales raised in support of his petition.

<sup>394</sup>116 U.S. 167 (1886).



*Royall*, the Court denied a petition to prohibit a pending court-martial on the ground it was not shown to lack jurisdiction, and not because the service member had an obligation to first raise his claim before the military court.

In 1950, the Supreme Court finally extended the doctrine of exhaustion of remedies to military tribunals in *Gusik v. Schilder*.<sup>395</sup> Thomas Gusik, a member of a guard company in Italy, was convicted by general court-martial of shooting and killing two civilians near his guard post. He was sentenced to life imprisonment, which was later reduced to 16 years. In a petition for habeas corpus, Gusik claimed that he had been denied an impartial and thorough pretrial investigation, that the trial judge advocate had failed to call material witnesses in his behalf, and that his counsel had been ineffective.

The Court refused to review Gusik's claims, holding that he first must present them to The Judge Advocate General of the Army in an application under Article of War 53.<sup>396</sup> The rationale mandating exhaustion of military remedies was held to be the same as that underlying the exhaustion requirement in state habeas corpus:

The policy underlying that rule [of exhaustion] is as pertinent to the collateral attack of military judgments as it is to collateral attack of civilian judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . . Such a principal of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.<sup>397</sup>

Despite the doctrine of exhaustion, the Supreme Court granted a number of habeas petitions during the 1950s to civilians who were pending trial by courts-martial.<sup>398</sup> Although exhaustion was never discussed in these cases, the Supreme Court later surmised that the

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<sup>395</sup>340 U.S. 128 (1950).

<sup>396</sup>See note 392 *supra*.

<sup>397</sup>*Gusik v. Schilder*, 340 U.S. at 131-32.

<sup>398</sup>See, e.g., *United States ex rel. McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

doctrine was deemed inappropriate because the cases involved the issue of whether, under Article I of the Constitution, "Congress could allow the military to interfere with the liberty of civilians even for the limited purpose of forcing them to answer to the military justice system."<sup>399</sup>

In *Noyd v. Bond*,<sup>400</sup> the Court extended the exhaustion requirement to extraordinary remedies available from the Court of Military Appeals. The petitioner, Noyd, had been convicted by court-martial of wilful disobedience of a lawful order and sentenced to one year's confinement at hard labor. While appealing his conviction in the military courts, Noyd sought habeas relief from the federal courts, challenging the authority of the military to confine him pending the appeal of his conviction. Finding that Noyd did not seek extraordinary relief from the Court of Military Appeals,<sup>401</sup> the Court affirmed the lower courts' denial of habeas relief.<sup>402</sup>

Three years after its decision in *Noyd*, the Court limited the application of the exhaustion doctrine in *Parisi v. Davidson*.<sup>403</sup> *Parisi* involved a habeas petition from an administrative denial of a conscientious objector application. Subsequent to the filing of the lawsuit, the petitioner, Parisi, disobeyed an order to board a plane for Vietnam. When court-martial charges were preferred against him, the district court stayed its adjudication of the habeas petition, relying on the doctrine of exhaustion. The Supreme Court held this was error. Because the military courts could not adjudicate Parisi's conscientious objective application and since a favorable resolution of that claim would be dispositive of the court-martial charges, no cogent basis existed for application of the exhaustion doctrine.<sup>404</sup>

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<sup>399</sup>*Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975). Another reason given for the failure of the Court to require exhaustion in these cases was its belief the military courts did not have the expertise to resolve the constitutional issues of the type presented. *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969).

<sup>400</sup>395 U.S. 683 (1969).

<sup>401</sup>The Court of Military Appeals had recently determined that it could grant the relief Noyd sought. *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967).

<sup>402</sup>*See also United States ex rel. Becker v. Semmons*, 357 F. Supp. 1135 (E.D. Wis. 1973).

<sup>403</sup>405 U.S. 34 (1972).

<sup>404</sup>The Court limited its opinion by inferring that if the military courts could grant the administrative relief sought, exhaustion would be required. *See Apple v. Greer*, 554 F.2d 105 (3rd Cir. 1977). Moreover, where there is no connection between the conscientious objector claim and the offense, the district court, even though upholding the claim, "might condition its order of discharge upon the completion of the court-martial proceedings and service of any lawful sentence imposed." *Parisi v. Davidson*, 405 U.S. at 46 n.15. *See Conrad v. Schlesinger*, 507 F.2d 867 (9th Cir. 1974) (narcotics offense). *See also Jacobs v. Stetson*, 450 F. Supp. 568 (N.D. Tex. 1978).

Thus, with the Court's decisions in *Gusik* and *Noyd*, the exhaustion doctrine had been firmly entrenched as a prerequisite to collateral review of courts-martial. *Parisi* did not modify the doctrine; it simply held that court-martial proceedings should not interfere with the orderly adjudication of an antedated and independent federal lawsuit challenging an administrative determination of a conscientious objector claim. By considering the administrative claim, federal courts could only indirectly affect the proceedings of the military tribunals.

Since *Gusik*, the most serious threat to the orderly operation of the military courts has come from service members seeking to enjoin court-martial proceedings on the basis of various jurisdictional and constitutional claims. Although such lawsuits are reported as early as World War II,<sup>405</sup> they began in earnest about the time of the Vietnam War. For example, in *Levy v. Corcoran*,<sup>406</sup> the District of Columbia Circuit denied Captain Howard Levy's petition for stay of his court-martial on charges of violating Articles 133 and 134 of the Uniform Code of Military Justice. Levy contended that the statutes were unconstitutional.<sup>407</sup> The petition was dismissed on several grounds, including the absence of equity jurisdiction to interfere with the military proceedings, the existence of an adequate remedy at law through the mechanisms provided by the military justice system, and Captain Levy's inability to establish irreparable injury.

The real impetus for injunction claims was the Supreme Court's decision in *O'Callahan v. Parker*,<sup>408</sup> in which the Court limited the

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<sup>405</sup>*In re Meader*, 60 F. Supp. 80 (E.D.N.Y. 1945) (court refused to enjoin court-martial on ground Navy intended to use certain illegally seized evidence against accused).

<sup>406</sup>389 F.2d 929 (D.C. Cir.) (per curiam), *application for stay denied*, 387 U.S. 915, *cert. denied*, 389 U.S. 960 (1967).

<sup>407</sup>Levy was to ultimately lose his challenge to the constitutionality of Articles 133 and 134 in the Supreme Court. *Parker v. Levy*, 417 U.S. 733 (1974).

Captain Levy's raft of procedural attacks on his court-martial rival the legendary Captain Oberlin M. Carter for persistence. Compare note 190 *supra*, with *Parker v. Levy* 417 U.S. 733 (1974), *rev'g*, 478 F.2d 772 (3d Cir. 1973); *Levy v. Dillon*, 286 F. Supp. 593 (D. Kan. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969); *Levy v. Resor*, 384 F.2d 689 (4th Cir. 1967), *cert. denied*, 389 U.S. 1049 (1968); *Levy v. Corcoran*, 389 F.2d 929 (D.C. Cir.), *application for stay denied*, 387 U.S. 915, *cert. denied*, 389 U.S. 960 (1967); *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967); *United States v. Levy*, 39 C.M.R. 672 (A.B.R. 1968), *petition for review denied*, 18 C.M.A. 627 (1969).

For other applications for injunctive relief based on constitutional or similar claims see *Autrey v. Wiley*, 440 F.2d 799 (1st Cir. 1971) (violation of NATO SOFA triggering loss of court-martial jurisdiction); *Waters v. Schlesinger*, 366 F. Supp. 460 (N.D. Tex. 1973) (constitutionality of Article 134, UCMJ).

<sup>408</sup>395 U.S. 258 (1969).

subject-matter jurisdiction of the military courts to "service-connected" offenses. From *O'Callahan* sprung a raft of lawsuits challenging pending courts-martial on "service-connection" grounds. The lower courts disagreed as to the proper disposition of such claims, some holding injunctive relief was proper because of the absence of court-martial jurisdiction,<sup>409</sup> while other courts, relying on the doctrines of exhaustion and abstention, denied relief.<sup>410</sup>

The controversy ended in 1975,<sup>411</sup> with the Supreme Court's decisions in *Schlesinger v. Councilman*<sup>412</sup> and *McLucas v. De Champlain*.<sup>413</sup> Relying on the dual considerations of comity, the necessity of respect for coordinate judicial systems, and the doctrine of exhaustion of remedies, the Court, in *Councilman*, reversed the judgment of lower federal courts that had enjoined an impending court-martial proceeding on the ground the offenses charged were not "service-connected." Justice Powell, writing for the Court, observed that the unique relationship between military and civilian society counsels strongly against the exercise of equity power to enjoin courts-martial in much the same manner that the peculiar demands of federalism preclude equitable intervention by the

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<sup>409</sup>See, e.g., *Councilman v. Laird*, 481 F.2d 613 (10th Cir. 1973), *rev'd sub nom. Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Cole v. Laird*, 468 F.2d 829 (5th Cir. 1972); *Moylan v. Laird*, 305 F. Supp. 551 (D.R.I. 1969). *Accord* *Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971) (injunction held proper remedy, but *O'Callahan* found inapplicable because offense occurred overseas).

<sup>410</sup>See, e.g., *Dooley v. Ploger*, 491 F.2d 608 (4th Cir. 1974); *Sedivy v. Richardson*, 485 F.2d 115 (3d Cir. 1973).

<sup>411</sup>The Supreme Court foreshadowed its ultimate resolution of the issue in *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, a three-judge district court enjoined a pending prosecution under the California Criminal Syndicalism Act, which prohibited advocacy, teaching, aiding or abetting of criminal syndicalism or the duty, necessity, or propriety of committing crime, terrorism, and the like, as a means of political or social change. The district court held that it had the authority to restrain state criminal proceedings under a facially unconstitutional statute, and that the California Criminal Syndicalism Act facially violated the First and Fourteenth Amendments of the Constitution.

Based on concerns for federalism and the doctrine of equitable jurisdiction that courts of equity should not act to restrain criminal prosecutions where there is an adequate remedy at law and a lack of irreparable injury, the Supreme Court reversed. The Court stressed that only the threat of irreparable injury which is "both great and immediate," justifies an injunction of a state criminal proceeding. *Id.* at 46. Potential injuries such as the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution do not constitute irreparable harm. Rather, "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* The Court concluded that "the possible unconstitutionality of a statute 'on its face' does not justify an injunction against good faith attempts to enforce it," and that the plaintiff had "failed to make a showing of bad faith, harassment, or any unusual circumstances that would call for equitable relief." *Id.* at 54.

<sup>412</sup>420 U.S. 738 (1975).

<sup>413</sup>421 U.S. 21 (1975).

federal courts in state criminal proceedings.<sup>414</sup> Similarly, the practical considerations supporting the exhaustion requirement, the need to allow agencies to develop the facts in which they are peculiarly expert, to correct their own errors, and to avoid duplicative or needless judicial proceedings, compel nonintervention in ongoing court-martial proceedings.<sup>415</sup>

Justice Powell concluded that these considerations militate strongly against judicial interference with pending courts-martial:

[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements, in holding that federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted . . . . The same principles are relevant to striking the balance governing the exercise of equity power. We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.<sup>416</sup>

Justice Brennan, joined by Justices Douglas and Marshall, dissented. He observed that, it being "virtually hornbook law that 'courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law,'" <sup>417</sup> the military courts "simply have no special, if any, expertise in the determination whether the offense was service connected." <sup>418</sup> Justice Brennan believed that military tribunals only were entitled to deference in cases involving "extremely technical provisions of the Uniform Code," <sup>419</sup> and "it baffle[d]" him that the Court could conclude "that

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<sup>414</sup>*Schlesinger v. Councilman*, 420 U.S. at 756-57. See note 411 *supra*.

<sup>415</sup>*Id.* at 756-57.

<sup>416</sup>*Id.* at 758.

<sup>417</sup>*Id.* at 765 (Brennan, J., dissenting) (quoting *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969)).

<sup>418</sup>*Id.* at 764.

<sup>419</sup>*Id.*

courts-martial or other military tribunals can be assigned, on grounds of expertise, in preference to civilian federal judges, the responsibility for constitutional decisionmaking."<sup>420</sup>

Later the same year, the Court applied its *Councilman* holding in *McLucas v. De Champlain*, in which a federal district court had enjoined a court-martial on constitutional grounds. The plaintiff, De Champlain, was an Air Force master sergeant who was charged with copying and attempting to deliver to an unauthorized person, a Soviet embassy official in Thailand, certain classified documents. The Air Force placed restrictions on De Champlain's civilian counsel's access to the classified records. The restrictions were challenged by De Champlain in the district court. Holding the restrictions "clearly excessive," the district judge ordered the court-martial restrained unless unlimited access to all documents was given to De Champlain's civilian counsel and his staff.<sup>421</sup>

The Supreme Court reversed. Relying on its decision in *Councilman*, it held that the restrictions placed on De Champlain's counsel's access to the classified documents could not support an injunction of the court-martial proceedings:

As to this claim, however, the only harm De Champlain claimed in support of his prayer for equitable relief was that, if convicted, he might remain incarcerated pending review within the military system. Thus, according to De Champlain, intervention is justified now to ensure that he receives a trial free of constitutional error, and to avoid the possibility he will be incarcerated, pending review, on the basis of a conviction that inevitably will be invalid. But if such harm were deemed sufficient to warrant equitable interference into pending court-martial proceedings, any constitutional ruling at the court-martial presumably would be subject to immediate relitigation in federal district courts, resulting in disruption to the court-martial and circumvention of the military appellate system provided by Congress.<sup>422</sup>

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<sup>420</sup>*Id.* at 765.

<sup>421</sup>The district court also enjoined any proceedings under Article 134, holding the statute unconstitutionally vague. The district court's ruling was overcome by the subsequent Supreme Court decision in *Parker v. Levy*, 417 U.S. 733 (1974). Moreover, since De Champlain was charged under the assimilated crimes provision of Article 134, rather than its other provisions, any vagueness in the statute could not have possibly affected him. *McLucas v. De Champlain*, 421 U.S. at 32.

<sup>422</sup>*Id.* at 33.



With the Supreme Court's decisions in *Gusik*, *Noyd*, *Councilman*, and *De Champlain*, the application of the doctrine of exhaustion of remedies to court-martial proceedings is presently well-settled,<sup>423</sup> especially when compared with the virtual anarchy which exists with respect to the scope of collateral review. If there is no certainty as to how a federal court will review a military conviction, at least there is a degree of predictability as to when it will conduct its review.

Moreover, the Court's decisions in this area properly accord the military judicial system the deference it is due by virtue of its independent constitutional underpinnings and its unique expertise in applying constitutional standards to the military environment. In this regard, Justice Brennan's dissent in *Councilman* that military courts lack expertise to apply constitutional law, especially to issues uniquely military such as "service-connection," is specious. Moreover, to base this judgment on such conclusory and hackneyed adages as courts-martial are "'singularly inept in dealing with the nice subtleties of constitutional law,'"<sup>424</sup> is disingenuous. There is "no intrinsic reason why the fact a man is a federal judge should make him more competent, or conscientious, or learned with respect to federal law,"<sup>425</sup> especially as it relates to the military, than those who are constitutionally-empowered to superintend the military justice system. Indeed, there is no basis for believing that a lawyer, whose only knowledge of the military comes from the entertainment or news media, should suddenly become on his or her ascension to the federal bench, a fount of wisdom on the application of constitutional principles to peculiar military problems. How is such a judge to know how a particular offense affects the military community, or how the application of a particular constitutional maxim will ultimately affect military discipline? Manifestly, it is the federal

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<sup>423</sup>See, e.g., *Sisson v. United States*, 736 F.2d 1277 (9th Cir. 1984); *Bowman v. Wilson*, 672 F.2d 1145 (3d Cir. 1982); *Baxter v. Claytor*, 652 F.2d 181 (D.C. Cir. 1981); *Kaiser v. Secretary of the Navy*, 542 F. Supp. 1263 (D. Colo. 1982); *Hodges v. Brown*, 500 F. Supp. 25 (E.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3d Cir. 1981); *United States ex rel. Cummings v. Bracken*, 329 F. Supp. 384 (S.D. Tex. 1971). *Accord* *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983). The only uncertainty in the application of the doctrine of exhaustion exists with respect to challenges to the military court's jurisdiction over the accused. Based on the Supreme Court's decisions in *Toth*, *Reid*, and *McElroy*, there is a split of authority as to whether a service member, claiming he is not properly in the armed forces, can seek immediate review of his claim in the federal courts. See note 398 *supra*. Compare *Adkins v. United States Navy*, 507 F. Supp. 891 (S.D. Tex. 1981), with *Hodges v. Brown*, 500 F. Supp. 25 (E.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3d Cir. 1981).

<sup>424</sup>See note 417 *supra*.

<sup>425</sup>*Bator*, *supra* note 206, at 509.

judiciary that should generally defer to the decisions of the military courts on issues raising uniquely military concerns, such as "service-connection."<sup>426</sup> As will be noted below, moreover, this deference should not only be employed in permitting the military courts to decide cases in the first instance, but also in the actual review of the military judgments.

### B. THE DOCTRINE OF WAIVER

Since the early nineteenth century, the civilian courts have applied waiver principles in collateral challenges to court-martial proceedings. This application was never entirely consistent. As a general rule, nondiscretionary statutory prerequisites for jurisdiction, such as the minimum size of the court,<sup>427</sup> the character of the membership,<sup>428</sup> and the existence of jurisdiction over the subject-matter<sup>429</sup> and the accused,<sup>430</sup> could not be waived; jurisdiction could not be created by consent.<sup>431</sup> On the other hand, potential jurisdictional requirements, which were partially discretionary in nature, such as the size of a court-martial within its statutory limits<sup>432</sup> and other matters of defense<sup>433</sup> could be waived.

After the Supreme Court's decision in *Burns* and when application of the "full and fair" consideration test was at its height, claims not raised in military courts were not considered when presented for the first time in collateral proceedings. As the Tenth Circuit succinctly noted in *Suttles v. Davis*: "Obviously, it cannot be said that [the

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<sup>426</sup>See *Calley v. Calloway*, 519 F.2d 184, 200-03 (5th Cir.), *cert. denied*, 425 U.S. 911 (1975).

<sup>427</sup>*In re Leary*, 27 Hun. (N.Y.) 564 (1882) (one-member court).

<sup>428</sup>*United States v. Brown*, 41 Ct. Cl. 275 (1906), *aff'd*, 206 U.S. 240 (1907) (Regular Army officers as member of court-martial trying volunteer officer); *Brooks v. Daniels*, 39 Mass. (22 Pick.) 498 (1839) (improper selection of membership); *Brooks v. Davis*, 34 Mass. (17 Pick.) 148 (1835) (improper selection of membership).

<sup>429</sup>*Duffield v. Smith*, 3 Serg. & Rawle (Pa.) 590 (1818) (state court-martial had no jurisdiction over a federal crime).

<sup>430</sup>*Ver Mehren v. Sirmeyer*, 36 F.2d 876 (8th Cir. 1929) (invalid induction).

<sup>431</sup>*Id.*; *United States v. Brown*, 41 Ct. Cl. 275 (1906), *aff'd*, 206 U.S. 240 (1907).

<sup>432</sup>*Bishop v. United States*, 197 U.S. 334 (1905); *Aderhold v. Menefee*, 67 F.2d 345 (5th Cir. 1933).

<sup>433</sup>See, e.g., *Mullan v. United States*, 212 U.S. 516 (1909) (evidentiary determinations); *Keyes v. United States*, 15 Ct. Cl. 532 (1879), *aff'd*, 109 U.S. 336 (1883) (accuser as a member); *Vanderheyden v. Young*, 11 Johns. (N.Y.) 150 (1814) (expiration of enlistment contract); *Warner v. Stockwell*, 9 Vt. 9 (1836) (claimed physical disability as exemption from militia duty).

military courts] have refused to fairly consider claims not asserted."<sup>434</sup>

With the demise of the "full and fair" consideration test and the concomitant expansion of collateral review, the courts turned to civilian habeas jurisprudence for an alternative waiver doctrine. From 1963 until the mid-1970s, application of the doctrine of waiver was governed in the civilian sphere by the Supreme Court's decision in *Fay v. Noia*.<sup>435</sup> In *Noia*, the Court ruled that a federal habeas court is not precluded from reviewing a federal constitutional claim simply because the habeas petitioner failed to raise the issue in the state courts. The Court blunted its ruling to some extent by developing the so-called "deliberate bypass" rule; where a petitioner deliberately bypassed the orderly procedure of the state courts by failing to raise his claim, the federal habeas judge had the discretion to deny relief:

If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can be fairly described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief in the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default.<sup>436</sup>

A number of federal courts applied the *Noia* "deliberate bypass" rule in collateral proceedings from military convictions.<sup>437</sup>

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<sup>434</sup>215 F.2d 760, 763 (10th Cir.), cert. denied, 348 U.S. 908 (1954). See also *Harris v. Ciccone*, 417 F.2d 479, 484 (8th Cir. 1969), cert. denied, 397 U.S. 1078 (1970); *United States ex rel. O'Callahan v. Parker*, 390 F.2d 360 (3d Cir. 1968), rev'd on other grounds, 395 U.S. 258 (1969); *Branford v. United States*, 356 F.2d 876 (7th Cir. 1966); *Palomera v. Taylor*, 344 F.2d 937, 939 (10th Cir.), cert. denied, 382 U.S. 920 (1965); *Kubel v. Minton*, 275 F.2d 789, 791 (4th Cir. 1960); *Thomas v. Davis*, 249 F.2d 232, 235 (10th Cir. 1957), cert. denied, 355 U.S. 927 (1958); *Marymount v. Joyce*, 352 F. Supp. 547, 552 (W.D. Ark. 1962).

<sup>435</sup>372 U.S. 391 (1963).

<sup>436</sup>*Id.* at 439. *Noia* overruled *Brown v. Allen*, 344 U.S. 443, 486-87 (1953), which had held that a failure to raise and preserve a constitutional issue before the state courts barred consideration by a federal habeas court.

<sup>437</sup>See, e.g., *Angle v. Laird*, 429 F.2d 892, 894 (10th Cir. 1970), cert. denied, 401 U.S. 918 (1971); *Barnett v. United States*, 617 F.2d 230 (Ct. Cl. 1980); *Gross v. United States*, 531 F.2d 482, 486 (Ct. Cl. 1976).

In a series of decisions beginning in 1973, the Supreme Court began chipping away at the *Fay v. Noia* "deliberate bypass" test and charted a course that would significantly restrict the availability of habeas relief. In *Davis v. United States*,<sup>438</sup> the Supreme Court denied collateral relief to a federal prisoner, who had challenged the makeup of the grand jury which indicted him, because he had failed to preserve the issue by a motion before his trial as required by the criminal procedure rules. The Court held that absent of showing of cause for the noncompliance and some demonstration of actual prejudice, the claim would be barred in a collateral proceeding.<sup>439</sup>

Three years later, in *Francis v. Henderson*,<sup>440</sup> the Supreme Court was faced with a similar challenge to a grand jury by a state prisoner, who had failed to preserve the issue in the state courts. Following its decision in *Davis*, the Court held that the petitioner was barred from raising his claim in a federal habeas proceeding, unless he could show cause for his failure to preserve the issue in the state courts and demonstrate actual prejudice.<sup>441</sup>

Whatever vitality was left in the "deliberate bypass" rule was gutted by subsequent Supreme Court decisions in *Wainwright v. Sykes*,<sup>442</sup> and *Engle v. Isaac*.<sup>443</sup> In *Sykes*, the Court held that the "cause and actual prejudice" standard set forth in *Davis* and *Francis* also applied to a defendant who failed to object to the admission of an allegedly illegally-procured confession at his state trial. Although the Court left the precise definition of "cause and actual prejudice" for future decisions, it expressly noted that it was a narrower standard than the "deliberate bypass" rule of *Noia*.<sup>444</sup> In *Isaac*, the Supreme Court applied the "cause and prejudice" test to bar a habeas claim based on the state courts' improper allocation of the burden of proof. Again declining to define the terms more spe-

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<sup>438</sup>411 U.S. 233 (1973).

<sup>439</sup>*Id.* at 242.

<sup>440</sup>425 U.S. 536 (1976).

<sup>441</sup>*Id.* at 542.

<sup>442</sup>433 U.S. 72 (1977).

<sup>443</sup>456 U.S. 107 (1982).

<sup>444</sup>*Wainwright v. Sykes*, 433 U.S. at 87.

cifically,<sup>445</sup> the Court reaffirmed its adherence to the standard "that any prisoner bringing a constitutional claim to the federal courthouse after state procedural default must demonstrate cause and actual prejudice before obtaining relief."<sup>446</sup>

With the passing of the *Fay v. Noia* "deliberate bypass" rule,<sup>447</sup> the federal courts should apply the stricter "cause and actual prejudice" test to issues petitioners fail to preserve in the military justice system. This assumption is compelled by the special deference the Supreme Court has shown the military courts in past decisions.<sup>448</sup> Indeed, the Tenth Circuit, in *Wolff v. United States*,<sup>449</sup> applied the "cause and prejudice" standard to a habeas petition challenging for the first time the form of immunity given a key prosecution witness

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<sup>445</sup>"Cause" is a legitimate excuse for default; 'prejudice' is actual harm resulting from the alleged constitutional violation." *Magby v. Wawrzaszek*, 741 F.2d 240, 241 (9th Cir. 1984). See also *Preston v. Maggio*, 741 F.2d 99, 101 (5th Cir. 1984). Rather than provide these terms precise content, the federal courts have applied them on an *ad hoc* basis. See *Farmer v. Pratt*, 721 F.2d 602, 606 n.6 (7th Cir. 1984). For example, in *Reed v. Ross*, 104 S. Ct. 2901 (1984), the Supreme Court found that the "novelty" of a constitutional claim can constitute sufficient cause for default. *Accord Weaver v. McKaskle*, 733 F.2d 1103, 1106 (5th Cir. 1984). Claimed ineffective assistance of counsel during the state court proceedings is another means by which a habeas petitioner can establish cause for default. *Carrier v. Hutto*, 724 F.2d 296 (4th Cir. 1983). *Accord Cong v. McKeen*, 722 F.2d 286 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1715 (1984). The element of prejudice is similarly fact-specific. See, e.g., *Henry v. Wainwright*, 743 F.2d 761, 763 (11th Cir. 1984); *Francois v. Wainwright*, 741 F.2d 1275, 1283 (11th Cir. 1984). See generally Comment, *Habeas Corpus—The Supreme Court Defines the Wainwright v. Sykes "Cause" and "Prejudice" Standard*, 19 Wake Forest L. Rev. 441 (1983).

<sup>446</sup>*Engle v. Isaac*, 456 U.S. at 129. See Comment, *The Burger Court and Federal Review for State Habeas Corpus Petitioners After Engle v. Isaac*, 31 Kan. L. Rev. 605 (1983). Of course, if the state courts review a habeas petitioner's federal claim regardless of his failure to raise the claim at trial, there has been no waiver and the federal courts may resolve the issue. See *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Hux v. Murphy*, 733 F.2d 737 (10th Cir. 1984); *Phillips v. Smith*, 717 F.2d 44 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984). Cf. *Smith v. Bordenkircher*, 718 F.2d 1273 (4th Cir. 1983) (review proper where state courts would not apply procedural default rule). Similarly, if a habeas petitioner presents the "substance" of a federal constitutional claim to the state courts and the state courts ignore the claim, there has been no waiver. See *Anderson v. Harless*, 459 U.S. 6 (1982); *United States ex rel. Sullivan v. Fairman*, 731 F.2d 450, 453 (7th Cir. 1984); *Lockett v. Arn*, 728 F.2d 266 (6th Cir. 1984).

<sup>447</sup>The "deliberate bypass" rule, rather than the "cause and prejudice" test, has been held to be applicable to cases in which a habeas petitioner has failed to take a direct appeal of a conviction in the state courts. *Beaty v. Patton*, 700 F.2d 110, 112-13 (3d Cir. 1983); *Thomas v. Zimmerman*, 583 F. Supp. 701, 705 (E.D. Pa. 1984). But see *United States ex rel. Barkan v. Fairman*, 581 F. Supp. 1284, 1286 (N.D. Ill. 1984). See generally Comment, *The Burger Court and Federal Review for State Habeas Corpus Petitioners After Engle v. Isaac*, 31 Kan. L. Rev. 605, 611 n.62 (1983).

<sup>448</sup>See, e.g., *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975).

<sup>449</sup>737 F.2d 877 (10th Cir. 1984).

at a court-martial. The petitioner's counsel at the court-martial did not object to the witness' testimony.<sup>460</sup> Finding that there was not good cause for the failure to object, the court refused to consider the merits of the claim.<sup>461</sup> Importantly, the court explicitly rejected the petitioner's contention that the "cause and prejudice" standard was inapplicable in collateral attacks on courts-martial.<sup>462</sup>

The application of this stringent waiver doctrine, while potentially influencing all aspects of military practice, will be especially significant with respect to the procedural default provisions of the Military Rules of Evidence. For example, military accused who fail to make timely objections to the admission of evidence obtained in violation of their right against self-incrimination<sup>463</sup> or their right against unlawful searches and seizures<sup>464</sup> forfeit the right to raise the issues during the remaining military proceedings. Under the doctrine of waiver, absent a demonstration of good cause for the procedural default and actual prejudice from the purported violations, an accused would be prohibited from asserting the objections in collateral challenges to court-martial convictions.

Thus, this strict doctrine of waiver should encourage military prisoners to present all of their constitutional claims before the military courts prior to seeking collateral relief, thereby permitting the military judiciary to apply its unique expertise to such claims. Denying military petitioners collateral relief for claims not raised in the military justice system protects the integrity and independence of the military courts by ensuring that they will have an opportunity to pass first on any issues ultimately reaching the federal courts.<sup>465</sup>

#### IV. COLLATERAL REVIEW OF COURTS-MARTIAL: DEFINING A PROPER BALANCE BETWEEN THE CIVILIAN AND MILITARY COURTS

As observed at the outset of this article, the key to determining a suitable scope of collateral inquiry of court-martial proceedings is striking a proper balance between the federal judiciary's role as final

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<sup>460</sup>*Id.* at 879.

<sup>461</sup>*Id.* at 880.

<sup>462</sup>*Id.* at 879.

<sup>463</sup>Mil. R. Evid. 304(d)(2)(A).

<sup>464</sup>Mil. R. Evid. 312(d)(2)(A).

<sup>465</sup>*Cf.* Rosenn, *supra* note 34, at 354 (effect of broad collateral review on state courts).



arbiter of constitutional law and the military courts' expertise in tailoring individual rights to military requirements. In formulating such a balance, a number of assumptions are made.

First, consistency among the federal courts in their collateral review of courts-martial is desirable.<sup>466</sup> The level of inquiry that a military claimant's, especially a military prisoner's, collateral attack receives should not be dependent upon the fortuity of his location or the vagaries of local practice.<sup>467</sup>

The need for uniformity on a national level in the collateral review of military convictions is especially compelling. Habeas corpus petitions of the prisoners of a particular state will, more or less, be consistently judged by the standards developed by the particular federal circuit in which the state lies. The military justice system, on the other hand, is federal in character. It is governed by rules and procedures applicable worldwide and it is supervised by centralized appellate courts. Thus, that the petition of a military claimant filing in Kansas should receive different treatment than one filed by a claimant in Pennsylvania, when both have been convicted under the same system of justice, offends basic notions of fairness. While nothing less than a Supreme Court decision can create the desired standardization in approach, after more than 30 years of silence, Supreme Court involvement is long overdue.

Second, and perhaps most obvious, determining the proper relationship between civilian and military courts cannot be done in a vacuum; historically, that relationship has been influenced by external factors, from the struggles between the Crown and Parliament to the evolution of civilian habeas corpus. Any proposed standard of review must reflect developments in other areas of the law. For example, no matter how intrinsically desirable a return to the common law limits of review might appear to some, given the present judicial climate, federal courts are unlikely to seriously consider such an approach. Thus, to discuss any proposal beyond the purely academic level, it is important to consider what standards might be deemed acceptable by the federal courts. Two current developments warrant consideration:

The first is the Military Justice Act of 1983,<sup>468</sup> which provides for the first time a means of direct civilian court review of military court convictions through certiorari to the Supreme Court from decisions of the Court of Military Appeals. Since the provisions of the Act have

<sup>466</sup>See Bishop, *supra* note 6, at 40-43; Katz & Nelson, *supra* note 17, at 218.

<sup>467</sup>See Note 6 *supra*.

<sup>468</sup>Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983).

only become operational, for the most part, in August 1984,<sup>459</sup> and because it will be several years before any discernible impact will be felt in the form of decisional law,<sup>460</sup> it is too early to accurately forecast the overall ramifications of the provisions on collateral proceedings. As a matter of law, however, the certiorari provision should have little effect. The filing of a petition for certiorari to the Supreme Court is not a prerequisite for federal habeas review of state criminal convictions<sup>461</sup> and, similarly, will not likely be a precondition for collateral review of military convictions. Additionally, a denial of certiorari in state proceedings is not interpreted as an expression of the Supreme Court's opinion on the merits of the case.<sup>462</sup> Thus, a denial of certiorari from an opinion of the Court of Military Appeals will not preclude or even influence later collateral review. Finally, only those cases actually reviewed by the Court of Military Appeals are subject to certiorari to the Supreme Court. Consequently, a relatively small number of cases will be directly affected by the provision.

The most immediate and possibly significant manifestation of the certiorari provision may be its effect on the federal courts' perception of the military justice system. On the one hand, federal courts may see the certiorari provision as an indication of congressional intent to reduce the independence of the military courts and thereby feel even less constrained in their review of military convictions. Such a view, however, is not justified. In subjecting Court of Military Appeals' decisions to Supreme Court review, Congress did not provide the lower federal courts with any power of oversight over military tribunals. More importantly, it at least tacitly elevated the stature of the Court of Military Appeals beyond a mere quasi-judicial, administrative body<sup>463</sup> to a tribunal entitled to the deference of other courts whose judgments are only directly reviewable by the United States Supreme Court.<sup>464</sup>

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<sup>459</sup>*Id.* § 12(a)(1).

<sup>460</sup>See Cooke, *Highlights of the Military Justice Act of 1983*, *The Army Lawyer*, Feb. 1984, at 40, 45.

<sup>461</sup>*Fay v. Noia*, 372 U.S. 391, 435-38 (1963). See also *Ulster County Court v. Allen*, 442 U.S. 140, 149-50 n.7 (1979); *Stone v. Powell*, 428 U.S. 465, n.38 (1976).

<sup>462</sup>*Brown v. Allen*, 344 U.S. 443, 488-97 (1953).

<sup>463</sup>See Comment, *Federal Civilian Court Intervention in Pending Courts-Martial*, *supra*, note 5, at 446.

<sup>464</sup>By providing direct access to the Supreme Court, the government now has a ready forum to review Court of Military Appeals' rulings on the constitutionality of federal statutes. See *United States v. Matthews*, 16 M.J. 354, 366 (C.M.A. 1983); *Wickham v. Hall* 12 M.J. 145, 154-46 (C.M.A. 1981) (Everett, C.J., dissenting). Before the Military Justice Act of 1983, the only means by which the government could have challenged such determinations, if at all, would have been through lawsuits for mandamus or declaratory relief in the federal district courts.

The second development that will affect the ultimate relationship between the civilian and military courts, is the Supreme Court's effort to circumscribe the use of civilian habeas corpus. "Commencing in 1976 and continuing to the present, the Court has announced a series of decisions limiting the availability of federal habeas relief."<sup>465</sup> For example, in *Stone v. Powell*<sup>466</sup> the Court harkened back to the pre-*Brown v. Allen*<sup>467</sup> era and held that, with respect to Fourth Amendment claims, where a state "has provided an opportunity for full and fair litigation . . . , the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."<sup>468</sup> The Court reasoned that the "overall educative effect of the exclusionary rule would [not] be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions . . . ." since such proceedings often occur years after the original trial and incarceration of a defendant.<sup>469</sup> Conversely, the societal costs of application of the exclusionary rule "still persist with special force."<sup>470</sup>

Although *Stone v. Powell* is perhaps the most significant of the Supreme Court's decisions restricting the use of federal habeas corpus, it is not the only one. In recent years the Court has tightened the exhaustion requirement,<sup>471</sup> formulated a stricter doctrine of waiver,<sup>472</sup> and broadened the scope of deference to be afforded state court findings of fact.<sup>473</sup>

Thus, the availability of federal civilian habeas corpus has been greatly constricted by the Supreme Court during the past eight years. In light of the deference the Court traditionally has afforded

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<sup>465</sup>Rosen, *supra* note 34, at 355.

<sup>466</sup>428 U.S. 465 (1976).

<sup>467</sup>344 U.S. 443 (1953).

<sup>468</sup>*Stone v. Powell*, 428 U.S. at 481-82.

<sup>469</sup>*Id.* at 493.

<sup>470</sup>*Id.* at 495. See also *Cardwell v. Taylor*, 103 S. Ct. 2015 (1983); *Gregory v. Wyrick*, 730 F.2d 542 (8th Cir. 1984). The *Stone v. Powell* "full and fair" litigation standard for Fourth Amendment claims has been subjected to criticism similar to that levelled at the *Burns v. Wilson* "full and fair" consideration test. See *Gregory v. Wyrick*, 730 F.2d at 534-44 (Heaney, J., concurring); Comment, *Habeas Corpus After Stone v. Powell: The "Opportunity for Full and Fair Litigation" Standard*, 13 Harv. C.R.C.L.L. Rev. 521, 545 (1978).

<sup>471</sup>See, e.g., *Anderson v. Harless*, 459 U.S. 4 (1982); *Rose v. Lundy*, 455 U.S. 509 (1982).

<sup>472</sup>See, e.g., *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); *Davis v. United States*, 411 U.S. 233 (1973).

<sup>473</sup>See, e.g., *Sumner v. Mata*, 455 U.S. 591 (1982); *Sumner v. Mata*, 449 U.S. 539 (1981).

the military,<sup>474</sup> it is unlikely that it would permit greater accessibility to collateral relief to military claimants.

Third, the military courts are capable of protecting the constitutional rights of an accused. Moreover, they are better able than federal civilian courts to properly balance individual rights against military needs.

That the military justice system, as an institution, is capable of protecting the constitutional rights of service members is evident from even a cursory examination of the opinions of the Court of Military Appeals. Except where military exigencies require a different rule, the same constitutional protections accorded civilian defendants are provided accused at courts-martial.<sup>475</sup> In some respects, such as the law regarding the right against self-incrimination, discovery, plea bargaining, procurement of witnesses,<sup>476</sup> and the right to a speedy trial,<sup>477</sup> the military courts are more solicitous of the rights of the accused than are their civilian counterparts. Moreover, with the development of an independent trial judiciary,<sup>478</sup> and, in the Army, a separate trial defense service,<sup>479</sup> service members are assured of the application of constitutional protections at the trial level without command interference.<sup>480</sup> This is not to suggest that courts-martial are "better" than civilian criminal courts. Because of military exigencies and tradition, civilian defendants enjoy certain advantages military accused do not, such as the right to bail<sup>481</sup> and random

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<sup>474</sup>See, e.g., *Middendorf v. Henry*, 425 U.S. 25 (1976); *McLucas v. De Champlain*, 421 U.S. 21 (1975); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 733 (1974); *Burns v. Wilson*, 346 U.S. 137 (1953). See generally *Chappell v. Wallace*, 103 S. Ct. 2362 (1983); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Brown v. Glines*, 444 U.S. 348 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Orloff v. Willoughby*, 345 U.S. 83 (1953).

<sup>475</sup>See, e.g., *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976). See generally *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244, 246-47 (1960).

<sup>476</sup>*Zimmerman*, *supra* note 4, at 38-39.

<sup>477</sup>Compare *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971), with *Barker v. Wingo*, 407 U.S. 514 (1972).

<sup>478</sup>See U.S. Dept. of the Army, Reg. No. 27-10 Legal Services—Military Justice, ch. 8 (1 Sept. 1982).

<sup>479</sup>See *id.* at ch. 6.

<sup>480</sup>See *Zimmerman*, *supra* note 4, at 40.

<sup>481</sup>*Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976).

jury selection.<sup>482</sup> But these advantages are often overstated,<sup>483</sup> and none go to the ability of the military justice system to protect the constitutional rights of military accused.<sup>484</sup>

If the military justice system has a problem, it is that it is still perceived by members of the civilian judiciary,<sup>485</sup> civilian bar,<sup>486</sup> and the public<sup>487</sup> "as a system which operates to the prejudice of the accused and fails to accord him the procedures and protections of the civil judicial process under the Constitution and the Federal Rules of Criminal Procedure."<sup>488</sup> Too often, civilian judges and commentators predicate their criticisms of the system on broad, fallacious generalizations, with little attempt to investigate in any detail the system itself:

The indictment of the military justice system one often reads from lawyers not familiar with the system should fail for insufficient evidence. Whatever minor differences

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<sup>482</sup>The most substantial disadvantage of the military justice system is that court members are selected by the same officer who exercises prosecutorial discretion. Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2)(1982). See Zimmerman, *supra* note 4 at 39; Comment, *Military Triers of Fact: A Needless Deprivation of Constitutional Protections?*, 33 Hastings L.J. 727 (1982).

<sup>483</sup>*Id.* For example, pretrial confinement in the military is subject to timely review by a neutral and detached magistrate. *United States v. Lynch*, 13 M.J. 394 (C.M.A. 1982); *United States v. Malia*, 6 M.J. 65 (C.M.A. 1978). See U.S. Dept. of the Army, Reg. No. 27-10, *Legal Services-Military Justice*, ch. 9 (1 Sept. 1982) (military magistrate program). Moreover, restrictions are imposed on the discretion of the convening authority in selecting court members. See, e.g., *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975) (impermissible to use rank as device for systematic exclusion of qualified court members). And military accused have the advantage of older, better-educated jurors. Zimmerman, *supra* note 4, at 39.

<sup>484</sup>*Id.* The participants in the military justice system primarily responsible for the protection of accused's constitutional rights, the military judge and the judges of the appellate courts, are unaffected by the relative disadvantages of the military courts in this regard. With respect to their decisionmaking on legal issues, they are independent of the convening authority and any command influence. See, e.g., *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976) (convening authority cannot overturn determinations of military judge on questions of law).

<sup>485</sup>See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 764-65 (1975) (Brennan, J., dissenting).

<sup>486</sup>See note 29 *supra*.

<sup>487</sup>See, e.g., Poydasheff & Suter, *supra* note 4, at 588 n.1; See also D. Wallechinsky & I. Wallace, *supra* note 116, at 643:

More than 100,000 servicemen face trial by court-martial each year. They are confined without bail; they are not tried by a jury of their peers; they have no guarantee of impartial judges, and in 95% of the cases, the verdict is guilty. Those convicted lose all of their rights. They can and do suffer cruel and inhumane treatment during punishment. Some are driven insane and others resort to suicide, all in the name of discipline at all costs, for this is military justice.

<sup>488</sup>Poydasheff & Suter, *supra* note 4, at 588-89.

there are when compared to state or civilian federal criminal justice systems, the military justice system serves well to protect the constitutional rights of the service member accused of crime.<sup>400</sup>

The real danger, of course, is that misperception might be translated into federal judicial activism and intervention, which could well compromise the independence of the military courts.

Not only are the military courts, as an institution, capable of protecting the rights of an accused, they are better able than the civilian judiciary to properly balance those rights against unique military requirements. Especially in such areas as the law of Fourth Amendment search and seizure, where the military environment greatly affects an accused's expectation of privacy,<sup>400</sup> the expertise of the military courts is essential and unique.<sup>401</sup>

Fourth, the federal courts should entertain and review collateral challenges to military convictions, except to the extent that the Supreme Court has foreclosed such review in the civilian sphere. Moreover, inasmuch as the federal courts have no appellate jurisdiction over courts-martial, Congress having entrusted that function to a separate judicial system, the issues cognizable in collateral challenges should be limited to constitutional claims and questions of technical jurisdiction.<sup>402</sup>

Furthermore, federal judges should accord considerable deference to military court determinations of constitutional issues insofar as they are found to affect special military requirements. The deference to be given under such circumstances should be greater than that shown constitutional determinations of the state courts. While there may be little justification for applying different federal constitutional standards to state prisoners, than to those in the federal civilian system, the military environment is conceptually different.<sup>403</sup> Unless a federal judge has more than just a passing familiarity with the military, it is difficult to appreciate how he or she can properly apply constitutional standards to unique military circumstances.<sup>404</sup> Wholesale intervention by federal judges into

<sup>400</sup>Zimmerman, *supra* note 4, at 40.

<sup>401</sup>See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>402</sup>See generally Note, *Civilian Court Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1277-78 (1960); Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 402-03 (1966).

<sup>403</sup>See *United States v. Augenblick*, 393 U.S. 348 (1969).

<sup>404</sup>See, e.g., *Parker v. Levy*, 417 U.S. 733, 743-44 (1974).

<sup>405</sup>Cf. Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 402 (1966) ("In balancing individual rights against military needs, the civilian courts cannot claim a monopoly on wisdom"). See generally Bator, *supra* note 206, at 509.



military convictions, without due regard for the prior determinations of the military courts, could undermine the function of the military judiciary and prejudice military needs. For example, a federal judge who, ignoring prior decisions of the Court of Military Appeals,<sup>495</sup> overturns a court-martial conviction based on evidence found during an inspection or a search authorized by a commander potentially undermines both military discipline and the role of the Court of Military Appeals in determining the proper scope of Fourth Amendment protections in the military setting.

The argument for deference is not meant to deprecate the role of the federal judiciary. Institutionally, federal courts are the final arbiters of all questions of federal constitutional law.<sup>496</sup> "[T]he finality to be allowed a military court determination of constitutional rights should be based on a careful analysis of the competence of civilian judges . . ."<sup>497</sup> But, absent some compelling justification, federal judges should not disregard the determinations of military courts that a particular application of constitutional protections might impair military discipline or readiness.<sup>498</sup> The decision of a federal judge to overturn a court-martial conviction should be based on something more than a reflexive disapprobation of military justice. The federal courts show deference to unique military requirements in other areas affecting the constitutional rights of individuals, ranging from control of installations,<sup>499</sup> to exclusion of certain classes of persons from military service,<sup>500</sup> to restrictions on the exercise of

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<sup>495</sup>See, e.g., *United States v. Acosta*, 11 M.J. 307 (C.M.A. 1981); *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981).

<sup>496</sup>See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 764-65 (1975) (Brennan, J., dissenting); *Burns v. Wilson*, 346 U.S. 137, 154 (1953) (Douglas, J., dissenting); *Brown v. Allen*, 344 U.S. 443, 508 (1953) (Frankfurter, J.).

<sup>497</sup>Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 403 (1966). See also *Fay v. Noia*, 372 U.S. 391, 424 (1963).

<sup>498</sup>*Calley v. Callaway*, 519 F.2d 184, 200-03 (5th Cir.) (en banc), cert. denied, 425 U.S. 911 (1975). See generally *Katz & Nelson*, *supra* note 17, at 299; *Developments in the Law—Federal Habeas Corpus*, *supra* note 18, at 1225.

<sup>499</sup>*Greer v. Spock*, 424 U.S. 828 (1976); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961).

<sup>500</sup>*Rostker v. Goldberg*, 453 U.S. 57 (1981) (exclusion of females from draft registration); *Dronenburg v. Zerk*, 741 F.2d 1388 (D.C. Cir. 1984) (exclusion of homosexuals); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (exclusion of homosexuals); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981) (exclusion of single parents); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981) (exclusion of homosexuals); *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980) (exclusion of Nazis).

First Amendment rights.<sup>501</sup> The need for deference is no less important in matters pertaining to military justice.<sup>502</sup>

With the foregoing premises in mind, a standard of review patterned after the analysis developed by the Fifth Circuit in *Calley v. Callaway*<sup>503</sup> appears best capable of balancing the roles of the civilian and military courts. Under such a standard, federal courts would be limited in their collateral inquiry to legal, as opposed to factual, issues of constitutional or jurisdictional significance. Moreover, where the military courts have modified constitutional standards to meet military exigencies, these determinations should not be disturbed in the absence of some compelling justification. To insure that military courts apply their expertise to such cases in the first instance, federal courts should strictly apply the doctrines of exhaustion and waiver. Finally, to the extent unique military needs do not affect the application of constitutional rights, federal courts should insure, in the same manner as they do in civilian habeas proceedings, that the military courts have applied proper legal principles.

## VI. CONCLUSION

There exists a relative state of anarchy in the relations between the federal civilian and military judiciary. In the absence of Supreme Court guidance, there has been little agreement among the lower federal courts as to the proper scope of collateral review of court-martial convictions. This diversity of approach potentially prejudices the rights of service members seeking federal judicial relief from military convictions. Unchecked federal judicial activism, based upon misperceptions of the fairness of military justice, could impair the independence of the military courts. Only a uniform approach, which strikes a balance between the roles of the federal civilian judiciary and the military courts, can insure equity for military claimants and maintain the integrity of the military justice system.

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<sup>501</sup>*Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C. Cir. 1984). *Accord* *Katoff v. Marsh*, 582 F. Supp. 468 (E.D.N.Y.), *appeal filed*, No. 84-6184 (2d Cir. June 11, 1984) (upholding Army Chaplaincy).

<sup>502</sup>See *supra* notes 28, 498.

<sup>503</sup>519 F.2d 184 (5th Cir.) (en banc), *cert. denied*, 425 U.S. 911 (1975).

## THE AVAILABILITY AND SCOPE OF JUDICIAL REVIEW OF DISCRETIONARY MILITARY ADMINISTRATIVE DECISIONS

by Captain John B. McDaniel\*

The judiciary in recent years has played an increasingly dominant role in the development of the law. In contract law, the "will of the parties," once determinative, has become merely one of the factors to be considered by the court.<sup>1</sup> *Caveat emptor* no longer rules the realm of commercial transactions.<sup>2</sup> New concepts of "property," of due process of law, and of the proper ambit of constitutional law have developed in recent years.<sup>3</sup> Equitable remedies have been creatively applied, and, as judicial willingness to use them to correct injustice has become commonplace in areas previously eschewed as unmanageable.<sup>4</sup> New rules of procedure have expanded the judge's role in the adversary system and all but mandated a shift in power from bar to bench.<sup>5</sup> Perhaps nowhere has the judiciary's power increased more dramatically than in the review of administrative decisions.

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\*Judge Advocate General's Corps, United States Army. Currently assigned to the Office of the Staff Judge Advocate, I Corps and Fort Lewis, Fort Lewis, Washington, 1984 to date. Formerly assigned as Commanding Officer, 550th Engineer Detachment, Fort Lee, Virginia, 1980-81; Platoon Leader, Company Executive Officer, staff officer, 65th Engineer Battalion, Schofield Barracks, Hawaii, 1977-80. J.D., *magna cum laude*, Harvard Law School, 1984; B.S., United States Military Academy, 1976. Completed 105th Judge Advocate Officer Basic Course, 1984; Engineer Officer Basic Course, 1976. Member of the bar of the Commonwealth of Massachusetts.

<sup>1</sup>Indeed, through the gradual but steady development of judicially-created doctrines such as quasi-contract, unjust enrichment, and promissory estoppel, the judges of this century are said to have presided over the "tortification" of contract law. See G. Gilmore, *The Death of Contract* (1974).

<sup>2</sup>Although much of this change was wrought by statute as well as by judicial pronouncement, the result has been a shift in power from seller to buyer, with a concomitant increase in judicial involvement developing, interpreting, and applying the new doctrines. *Id.*

<sup>3</sup>*E.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972), and its progeny; *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny including *Roe v. Wade*, 410 U.S. 113 (1973). On the conflict between constitutional "interpretivists" and "noninterpretivists," and for a principled "representation-reinforcing" approach which belongs to neither camp, see J. Ely, *Democracy and Distrust* (1980).

<sup>4</sup>*E.g.*, consider the now-familiar equitable remedies employed in the desegregation and voting rights areas following *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and *Baker v. Carr*, 369 U.S. 186 (1962), respectively, as well as such unrelated innovations as *Perez v. Boston Hous. Auth.*, 379 Mass. 703, 400 N.E.2d 1231 (1980) (upholding appointment of a receiver to administer the Boston Housing Authority).

<sup>5</sup>*E.g.*, compare the 1983 amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure with their predecessor versions found in 28 U.S.C. App.-Rules of Civ. P. (1976 & Supp. V 1981).

The purpose of this article, in broad terms, is to determine whether a similar movement can be discerned and appraised in the review of discretionary military administrative decisions. It is clear that there exists generally a presumption in favor of the reviewability of administrative actions.<sup>6</sup> As Professor Kenneth Culp Davis has aptly demonstrated,<sup>7</sup> the increasing willingness of the judiciary to intrude upon what once was the exclusive domain of administrators has coincided with the development of the concept of a limited scope of judicial review. By and large, this development, limited review and the concomitant growth in judicial oversight of administrative decisionmaking, has been beneficial. "Administrative law," however, is a broad, if not undefinable subject for which general principles are not easily discerned or applied. That development of a limited scope of review generally has facilitated meaningful and beneficial judicial oversight of administrative decisionmaking is not to say, however, that courts always ought to review administrative decisions.

As will be demonstrated, the judicial groundwork has been laid for increased oversight of discretionary administrative decisions; accordingly, one can expect to encounter court challenges to discretionary military decisions. Our society has become increasingly litigious, and there are indications that courts are more receptive to such challenges in peacetime than during times of crisis.<sup>8</sup> It is appropriate, therefore, for the military practitioner to determine whether the military deserves special treatment or whether the military should be subject to the general trend of judicial willingness to review discretion. More particularly, this article will consider whether the ever-growing presumption of the availability of judicial review of administrative discretion can be reconciled with the historical tradition of nonreviewability of military discretion and thus provide a principled basis for relieving the military in appropriate cases from the burdens of judicial review.

The key question is this: In what cases, if any, and by what rationale does the fact that the military is involved in a particular decision justify a more limited standard of review, or no review at all? Although the article will examine generally the scope of review of

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<sup>6</sup>*Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

<sup>7</sup>K. Davis, *Administrative Law Treatise* § 28.07 (1958).

<sup>8</sup>See, e.g., *Ornato v. Hoffman*, 546 F.2d 10, 15 (2d Cir. 1976) (indicating that courts will examine military cases more closely during peacetime). See also Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 192-97 (1962); *infra* notes 173 & 174 and accompanying text.

discretionary military administrative decisions, emphasis will be placed on identifying and explaining the circumstances in which the military deserves a more limited standard of review for its discretionary decisions than is provided for comparable discretionary decisions of other agencies.

## I. DEFINITIONS AND SCOPE

The definition of "discretion" used in this article is the one developed by Professor Davis: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."<sup>9</sup> "Discretion" in this sense is exercised daily in countless ways at all levels of the military. Of course, of main concern here are those discretionary decisions that are likely to be the subject of judicial review. Predicting which discretionary decisions ultimately may be challenged in court, however, is becoming increasingly difficult. The following examples are illustrative of only a small portion of the wide variety of discretionary decisions that occur in the military:

*Example 1:* An infantry platoon leader requests two weeks leave so he can accompany his wife to her niece's wedding six months hence. The company commander, mostly because of training plans for that time period, summarily denies the request.<sup>10</sup>

*Example 2:* After being accused of child molesting by a seven-year old girl, a soldier makes a statement incriminating himself. A psychiatrist, a chaplain, and the little girl's parents all agree that it will irreparably hurt the little girl if she is required to go on the witness stand and testify. The soldier demands trial by court-martial. The convening authority refuses to convene a court-martial and instead refers the case to an administrative elimination board so that the girl will not have to testify.<sup>11</sup>

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<sup>9</sup>K. Davis, *Discretionary Justice A Preliminary Inquiry* 4 (1969).

<sup>10</sup>*Cf.*, K. Davis, *supra* note 7, § 28.16, at 82. Professor Davis implied that courts should not review such action even for abuse of discretion. *But see* Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 996-97 (1969) (apparently favoring review of such military discretion).

<sup>11</sup>From example given by Major General A. M. Kuhfeld, The Judge Advocate General of the Air Force, *Summary of Report of Hearings on Constitutional Rights of Military Personnel*, pursuant to S. Res. 58, 88th Cong., 1st Sess. 1, *quoted in* *McCurdy v. Zuckert*, 359 F.2d 491, 495 n.6 (5th Cir. 1966).

*Example 3:* A soldier is caught in possession of several marijuana cigarettes. The company commander, based both on his estimate of the company's current need for a deterrent effect and on the particular soldier's past history of disciplinary problems, recommends trial by court-martial despite the fact that a month earlier a similar incident involving another soldier was handled by nonjudicial punishment.<sup>12</sup>

*Example 4:* A promotion board, based on the personnel files presented to it, decides not to recommend Major X for promotion to lieutenant colonel. Because he has been passed over for this promotion once before, unless Major X is selectively retained on active duty, he will be discharged.<sup>13</sup>

*Example 5:* The Navy owns land on islands A and B. In the past both sites have been used for live fire training for air to ground and naval gunfire support. For various reasons, the Navy ceases using A, so that all live fire training in the area is now conducted on B. Predictably, there is an increase in adverse environmental effects on B, as well as greater nuisance effect on neighboring landowners there (presumably with the converse effects on A).<sup>14</sup>

*Example 6:* After being recommended by his company commander, service member C is granted a waiver of one of the qualifications required by regulation to receive an award. After similar recommendation, Service member D is denied the award although a similar waiver would have enabled him to receive it.<sup>15</sup>

*Example 7:* Faced with a serious and pervasive drug abuse problem in his command, the Commander, United States Army in Europe (USAREUR), initiates a new drug abuse prevention program. The program involves, *inter alia*,

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<sup>12</sup>On the analogous issue of prosecutorial discretion in civilian society, compare *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967) (opinion by Circuit Judge Burger), with *Davis*, *supra* note 9, at 188-214. As this article intends to demonstrate, there are reasons why military prosecutorial discretion is even less appropriately the subject of judicial review than civilian prosecutorial discretion.

<sup>13</sup>10 U.S.C. §§ 632, 637 (1982).

<sup>14</sup>*Cf.*, *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979), *aff'd in part, vacated in part sub nom. Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1981), *rev'd sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

<sup>15</sup>Hypothetical from Suter, *Judicial Review of Military Administrative Decisions*, 6 Hous. L. Rev. 55, 80-81 (1968).



warrantless unit inspections for drugs without probable cause and further curtailment of individual liberties of those service members enrolled in the program.<sup>16</sup>

*Example 8:* After reviewing cost comparison studies showing a probability of substantial savings, a post commander decides to contract out to a private concern certain stevedoring services presently performed by civilian government employees. Once the work is contracted out, a substantial number of government employees will lose their jobs.<sup>17</sup>

*Example 9:* Following a dispute between a lieutenant and the XYZ Used Car Co., an investigation by staff officers showed that the lieutenant had been defrauded. The post commander places XYZ "off limits" to military personnel under his command.<sup>18</sup>

The term "the military" includes the Office of the Secretary of Defense, the Joint Chiefs of Staff, and the three military departments: Department of the Army, Department of the Air Force, and Department of the Navy.<sup>19</sup> However, the principles of judicial review developed herein should apply to review of discretionary decisions of the twelve Department of Defense agencies.<sup>20</sup>

"Military administrative decisions" embraces all decisions of "the military" and of its members acting in their official capacities, except for decisions integrally related to courts-martial, to military commissions, to the exercise of authority in the field in wartime or in occupied territory, or to rulemaking insofar as the latter involves federal publication requirements. The exceptions above, other than

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<sup>16</sup>See *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (upholding the program under constitutional attack).

<sup>17</sup>See, e.g., *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3d Cir. 1979); *American Federation of Government Employees, Local 1668 v. Dunn*, 561 F.2d 1310 (9th Cir. 1977).

<sup>18</sup>See *Harper v. Jones*, 195 F.2d 705 (10th Cir.), *cert. denied*, 344 U.S. 821 (1952) (upholding an off-limits order).

<sup>19</sup>The Department of the Navy includes the United States Marine Corps.

<sup>20</sup>The twelve Department of Defense agencies are the Defense Advanced Research Projects Agency (DARPA), the Defense Civil Preparedness Agency (DCPA), the Defense Mapping Agency (DMA), the Defense Logistics Agency (DLA), the Defense Contract Audit Agency (DCAA), the Defense Security Assistance Agency (DSAA), the Defense Nuclear Agency (DNA), the Defense Communications Agency (DCA), the Defense Intelligence Agency (DIA), the National Security Agency/Central Security Service, the Defense Audit Service (DAS), and the Defense Investigative Service (DIS). All are independent of the military departments. See U.S. Dep't of Army, Pamphlet No. 27-21, para. 2.4d (15 May 1980).

rulemaking, coincide with the military exceptions recognized in the Administrative Procedure Act.<sup>21</sup> The definition is intended to include all decisions made by officials of the military except for those specifically excluded, so that "discretionary military administrative decisions" will include all such decisions involving the exercise of "discretion" as defined above.<sup>22</sup>

## A. REVIEW OF DISCRETION GENERALLY

Before addressing the availability and scope of review of discretionary military administrative decisions, it will be helpful to examine the state of the law concerning review of discretionary administrative decisions in general. Because much of the doctrine on this subject as been developed by courts applying the APA,<sup>23</sup> appraising the utility of that doctrine for our purposes poses a threshold question of the applicability of that Act to the military.

### 1. Applicability of the APA to the Military

For purposes of the judicial review provisions of the APA,<sup>24</sup> Section 701(b) of Title 5, U.S. Code, defines "agency," in pertinent part, as:

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

....

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; . . . .<sup>25</sup>

By specifically excluding only certain military functions, Congress must have intended by negative implication that, in the exercise of other functions, the military should be included within the term "agency" and therefore subject to the judicial review provisions of the APA.

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<sup>21</sup>See *infra* notes 23-25 and accompanying text.

<sup>22</sup>Davis, *supra* note 9, at 21, emphasizes the point that adjudication, in its normal administrative law sense, embraces only a small portion of all decisions involving the exercise of discretion.

<sup>23</sup>Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982).

<sup>24</sup>5 U.S.C. §§ 701-706 (1982) contain the judicial review provisions of the APA.

<sup>25</sup>This definition coincides generally with that found in 5 U.S.C. § 551(1) (1982) defining "agency" for purposes of the APA's administrative procedure provisions, with one exception not here relevant.

Such a reading is supported by the legislative history:

The committee feels that it has avoided the mistake of attempting to oversimplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their own functions.<sup>26</sup>

Although forceful arguments have been made that the APA should not apply to the military,<sup>27</sup> it is unlikely that a court today faced with the issue would so hold. Prior to the Supreme Court's 1977 decision in *Califano v. Sanders*,<sup>28</sup> almost all writing and decisions regarding applicability of the APA's judicial review provisions to an administrative decision, military or otherwise, were enmeshed in the long-standing debate over whether the APA constituted an independent jurisdictional grant, *i.e.*, whether it was a "general review" statute.<sup>29</sup> *Califano* resolved the question in the negative: "We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."<sup>30</sup>

The holding in *Califano* should not diminish the precedential value of earlier cases granting review of military administrative decisions based upon a finding of jurisdiction under the APA. Any court that so held before *Califano* would undoubtedly continue to look to the APA for the appropriate standard of review in a case where jurisdiction is predicated on some independent statute not furnishing its

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<sup>26</sup>S. Rep. No. 752, 79th Cong., 1st Sess. 5 (1945). The separate War and Navy Departments have since been reorganized under the Department of Defense; see *supra* note 19 and accompanying text.

<sup>27</sup>Suter, *supra* note 15, at 57-60.

<sup>28</sup>*Califano v. Sanders*, 430 U.S. 99 (1977).

<sup>29</sup>Advocating that the APA should be construed as an independent jurisdictional grant, see, *e.g.*, Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 326-31 (1967). See also L. Jaffe, *Judicial Control of Administrative Action* 164-165 (abridged student ed. 1965).

<sup>30</sup>*Califano*, 430 U.S. at 107. The *Califano* decision rested in large part on the fact that, because the 1976 amendment of 28 U.S.C. § 1331(a) eliminated the amount in controversy requirement in certain federal question cases, the perceived need for finding a jurisdictional grant in the APA disappeared. See *infra* notes 50 & 51 and accompanying text.

own standard or preclusion of review.<sup>31</sup> Thus, the pre-*Califano* cases applying the APA to the military remain valid for the proposition that the APA's judicial review provisions apply to military administrative decisions.

In 1967, the Supreme Court, in *Abbott Laboratories v. Gardner*,<sup>32</sup> declared that Congress intended for the APA to "cover a broad spectrum of administrative actions" and that the Act's "'generous review provisions' must be given a 'hospitable' interpretation."<sup>33</sup> Federal courts faced with the issue since *Abbott Laboratories* have uniformly held that the APA applies to the military.<sup>34</sup> Several courts of appeals interpreting the APA definition of "agency" have developed tests which clearly encompass the military.<sup>35</sup> The Second and Third Circuits have held explicitly that the APA applies to the military;<sup>36</sup> other courts have assumed the same without discussing the issue.<sup>37</sup>

It bears emphasis that the foregoing has been demonstrated not because the APA's applicability to the military greatly affects the standard of review which otherwise would govern discretionary military administrative decisions,<sup>38</sup> but rather to forestall any doubts as to the relevance for our purposes of cases involving discretionary actions by other agencies, most of which are decided under the APA.

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<sup>31</sup>Presumably all of the military cases heard before *Califano* could be heard today under 28 U.S.C. § 1331 (1982) as amended to remove the amount in controversy requirement. See *infra* notes 50 & 51 and accompanying text.

<sup>32</sup>*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

<sup>33</sup>*Id.* at 140-41.

<sup>34</sup>E.g., *Garmon v. Warner*, 358 F. Supp. 206 (W.D.N.C. 1973); *Etheridge v. Schlesinger*, 362 F. Supp. 198 (E.D. Va. 1973).

<sup>35</sup>E.g., *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) ("[T]he APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions"). In *Ellsworth Bottling Co. v. United States*, 408 F. Supp. 280, 282 (W.D. Okla. 1975), the court found the Army and Air Force Exchange Service to be an "agency" within the meaning of the judicial review provisions of the APA by applying the following test: "The test for determining whether an arm of the government has sufficient authority to justify classifying it as an agency under the APA is whether the arm has the authority to act with the sanction of the Government behind it."

<sup>36</sup>*Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3d Cir. 1979); *Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976).

<sup>37</sup>E.g., *William F. Wilke, Inc. v. Department of the Army*, 485 F.2d 180, 183 (4th Cir. 1973).

<sup>38</sup>Indeed, as will be seen, one of the main contentions of this article is that the standard of review is not thus affected. The effect of the APA's "committed to discretion" exception, instead, leaves many such cases reviewable, if at all, only for abuse of discretion.

## 2. *The Presumption of Reviewability and the Committed to Discretion Exception*

Today there is a well-settled "presumption of reviewability" of administrative action.<sup>39</sup> In the absence of an express statutory prohibition of judicial review, the burden of proof of nonreviewability is clearly on the administrative agency which seeks to prevent judicial review of a challenged action.<sup>40</sup> As will be seen, even where the challenged action is properly characterized as discretionary, the chances of completely avoiding judicial review are slim indeed. As mentioned earlier,<sup>41</sup> this is due in no small part to the development of the concept of a limited scope of judicial review, that is, the notion that a court can review agency action in order to insure some minimum rationality of decisionmaking without substituting its own judgment for that of the agency.<sup>42</sup>

Because so much of the case law has developed under the APA, it is essential to examine certain of that Act's provisions. Section 701(a) provides:

This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.<sup>43</sup>

Section 706, governing scope of review, reads in its entirety:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and

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<sup>39</sup>*Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

<sup>40</sup>*Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

<sup>41</sup>See *supra* note 7 and accompanying text.

<sup>42</sup>The tests are phrased variously as "any basis in fact," "arbitrary and capricious," "abuse of discretion," supported by "substantial evidence," or "clearly erroneous." Although there are supposed to be distinct variations in degree among at least some of these terms, the courts frequently blur the distinctions both in theory and in practice. See, e.g., K. Davis, *Administrative Law of the Seventies* § 29.00 (1976) (discussing the confusion even as to the theoretical distinctions generated by the Supreme Court in recent decisions).

<sup>43</sup>5 U.S.C. § 701(a) (1982).

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.<sup>44</sup>

In light of the foregoing provisions, what is the appropriate scope of review for agency actions, findings, and conclusions that involve discretion, or are "committed to agency discretion by law?" Are such actions nonreviewable, reviewable outside of the APA, or reviewable in accordance with the APA, specifically section 706(2)(A)?

The question has perplexed commentators and judges for some time. All seem to agree that the mere fact that an agency decision involves some measure of discretion does not immunize it from judicial review.<sup>45</sup> This is a logical and necessary result because almost any administrative action will involve some amount of discretion.<sup>46</sup> Indeed, discretion is an indispensable part of civilized government.<sup>47</sup>

<sup>44</sup>*Id.* at § 706.

<sup>45</sup>This fact is implicit in the standard of review set forth in 5 U.S.C. § 706(2)(A), which authorizes courts to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (emphasis added). The courts are in agreement. See, e.g., *Krueger v. Morton*, 539 F.2d 235, 239 (D.C. Cir. 1976); *Ortego v. Weinberger*, 516 F.2d 1005, 1009 (5th Cir. 1975); *Littell v. Morton* 445 F.2d 1207, 1211 (4th Cir. 1971); *Knight Newspapers, Inc. v. United States*, 395 F.2d 353, 358 (6th Cir. 1968); *Wong Wing Hang v. Immigration and Naturalization Serv.* 360 F.2d 715, 718 (2d Cir. 1966); *Ferry v. Udall*, 336 F.2d 706, 711 (9th Cir. 1964). This view also comports with the language used by the Supreme Court in discussing the "committed to discretion" exception in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) ("This is a very narrow exception").

<sup>46</sup>E.g., *Ferry v. Udall*, 336 F.2d 706, 711 (9th Cir. 1964); *Davis, supra* note 9, ch. 1.

<sup>47</sup>*Davis, supra* note 9, at 25.



The key question, therefore, centers upon the meaning and effect of "committed to agency discretion by law." Unfortunately, the cases are in considerable confusion, both between and within the federal circuits.

At first reading of the statutory provisions quoted above, one might conclude that administrative decisionmaking is absolutely nonreviewable to the extent it is "committed to agency discretion by law." A number of commentators<sup>48</sup> and courts<sup>49</sup> have at times reached this conclusion. A close reading of the statute, however, reveals that the plain words of § 701(a)(2), the "committed to discretion exception," do not grant nonreviewability status to such decisions. The exception merely states, at most, that the judicial review provisions of the APA do not apply, but that whatever judicial review standards otherwise would apply do apply. Much of the non-reviewability language in the opinions occurred prior to the 1976 amendment of 28 U.S.C. § 1331(a),<sup>50</sup> which eliminated any amount in controversy requirement for federal question jurisdiction where the defendant was the United States, an agency, or any officer or

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<sup>48</sup>K. Davis, *Administrative Law Treatise* §§ 28.08, 28.16 (1958); Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 Minn. L. Rev. 643 (1967); Davis, *Administrative Arbitrariness—A Final Word*, 114 U. Pa. L. Rev. 814 (1966); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. Pa. L. Rev. 823 (1966); Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 427-28 (1958); Saferstein, *Non-reviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 Harv. L. Rev. 367 (1968). But see L. Jaffe, *Judicial Control of Administrative Action* 359-363 (abridged student ed. 1965); Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965 (1969); Berger, *Administrative Arbitrariness: A Sequel*, 51 Minn. L. Rev. 601 (1967); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. Pa. L. Rev. 783 (1966); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word"*, 114 U. Pa. L. Rev. 816 (1966); Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55 (1965).

<sup>49</sup>*Ferry v. Udall*, 336 F.2d 706, 712 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965) (distinguishing between statutes that positively mandate agency action, as to which review is always available notwithstanding agency discretion, and those which are merely permissive in granting an agency power to act, as to which review is held not to be available). *Accord* Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574 (3d Cir. 1979); *Rasmussen v. United States*, 421 F.2d 776 (8th Cir. 1970); *Knight Newspapers, Inc. v. United States*, 395 F.2d 353, 358 (6th Cir. 1968). *Panama Canal Co. v. Grace Line*, 356 U.S. 309 (1958), upon which the *Ferry* court relied in drawing its mandatory-permissive distinction, however, probably better stands for the narrower principle that an agency's expertise in deciding a particular issue, even an issue of statutory interpretation, may justify judicial deference to the extent of refusing to review. This seems to have been acknowledged by the Ninth Circuit in *Ness Investment Corp. v. United States Dep't of Agriculture*, 512 F.2d 706, 714 (9th Cir. 1975). Nevertheless, the Ninth Circuit has recently reaffirmed its adherence to the dichotomous view expressed in *Ferry*. See *Gifford v. Small Business Admin.*, 626 F.2d 85, 86 (9th Cir. 1980).

<sup>50</sup>28 U.S.C. § 1331 (a) (Supp. I 1977) (current version at 28 U.S.C. § 1331 (Supp. V. 1981)).

employee thereof in his official capacity.<sup>51</sup> Before 1976, judicial references to "nonreviewability" may well have reflected the apparent dilemma presented in cases where jurisdiction was sought solely upon the strength of the APA: if the APA by its terms was not applicable, jurisdiction to hear the case did not exist and the action was *ipso facto* nonreviewable, or so the argument goes.<sup>52</sup>

It bears emphasis that, at least to careful advocates of the position, this view of "absolute nonreviewability" immunizes agency action from judicial review only to the extent that it is committed to discretion.<sup>53</sup> The discretion itself is purported to be nonreviewable. Although "committed to agency discretion," the action generally remains reviewable to determine whether it violates the Constitution, a statute, an agency regulation, or is beyond the authority of the agency.<sup>54</sup> Thus, the real point of contention centers on whether the agency's exercise of discretion itself is reviewable for abuse of discretion, arbitrariness, capriciousness, or by some similarly limited standard of review.<sup>55</sup> Advocates of absolute nonreviewability content that, to the extent it is "committed to agency discretion," agency action is not reviewable, even for abuse of discretion, arbitrariness, and the like.

Close analysis of the statute at least supports a reading which leaves room for some restrictive judicial review outside of the APA for abuse of discretion. An arguably proper view of the legislative intent leaves such actions subject to review under a standard precisely such as that embodied in § 706(2)(A) of the APA.<sup>56</sup> Because, under our system, the government derives its powers from the consent of the governed, one of the tacit assumptions underlying the consent of the body politic must be that the government will not deal arbitrarily or lawlessly with its citizens. Specifically, there is a real question whether the legislature, in a statute of general applicability, can either authorize an agency to act in the manner prescribed by sec-

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<sup>51</sup>Significantly, the same Act, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (1976), removed the defense of sovereign immunity as a bar to judicial review of federal administrative action otherwise subject to judicial review. 5 U.S.C. § 702 (1982).

<sup>52</sup>Such reasoning ignores other possibilities for "nonstatutory" review. See Byse & Flocca, *supra* note 29, at 321-26.

<sup>53</sup>Davis, *supra* note 48.

<sup>54</sup>E.g., Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 580 (3d Cir. 1979); Ness Investment Corp. v. United States Dep't of Agriculture, 512 F.2d 706, 715 (9th Cir. 1975).

<sup>55</sup>5 U.S.C. § 706(2)(A) (1982). See *supra* note 44 and accompanying text.

<sup>56</sup>This is the general review provision applicable when no other, broader standard of review under the APA applies. It is quoted in the text accompanying note 44 *supra*.

tion 706(2)(A) or preclude review of such action.<sup>57</sup> In constitutional terms, were the statute construed to authorize or preclude judicial review of *arbitrary* administrative action, the APA as applied in a given case could result in a deprivation of liberty or property without due process of law.<sup>58</sup>

Furthermore, if a literal reading of Section 701(a)(2) proscribes review for arbitrariness or for "abuse of discretion" under section 706(2)(A), it must literally proscribe review under the other subsections of section 706(2), such as subsections (B) and (C) which direct reviewing courts to set aside agency action contrary to constitutional or statutory right or in excess of statutory jurisdiction.<sup>59</sup> Yet, complaints of these latter varieties are undeniably subject to review, whether under or outside of the APA.

Whether motivated by fears of unconstitutionality, by conclusions as to legislative intent, by statutory construction, or simply by an abiding belief in the value of the courts as a check on administrative discretion, the trend in the past twenty years has been to construe the "committed to discretion" exception as permitting judicial review for abuse of discretion. Although two other cases clearly were harbingers of the change,<sup>60</sup> the Fourth Circuit's decision in *Littell v. Morton*<sup>61</sup> probably is the most-cited case for the proposition that, despite legislative commitment of a challenged decision to the discretion of the agency head,<sup>62</sup> "the APA provides limited judicial review to determine if there was an abuse of that discretion."<sup>63</sup> In defining the scope of this limited review, the *Littell* court adopted

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<sup>57</sup>This is not to mention the rather dubious assumption that it ever would so intend. Even if one believes that Congress could constitutionally authorize an agency to act arbitrarily or to abuse its discretion, Congress undoubtedly did not so intend when it enacted the APA. For complete discussion of the legislative history of the exception and support for the theory that Congress did not so intend, see Berger, *Administrative Arbitrariness: A Synthesis*, *supra* note 48.

<sup>58</sup>Berger, *Administrative Arbitrariness: A Synthesis*, *supra* note 48; Berger, *Administrative Arbitrariness—A Sequel*, *supra* note 48; Berger, *Administrative Arbitrariness and Judicial Review*, *supra* note 48; Comment, *Administrative Law and Procedure—Judicial Review—Citizens to Preserve Overton Park, Inc. v. Volpe*, 60 Geo L.J. 1101, 1108-09 (1972). Cf. Jaffe, *supra* note 29, at 376-89.

<sup>59</sup>Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, *supra* note 48; Berger, *Administrative Arbitrariness and Judicial Review*, *supra* note 48.

<sup>60</sup>*Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970); *Wong Wing Hang v. Immigration and Naturalization Serv.*, 360 F.2d 715, 718-19 (2d Cir. 1966).

<sup>61</sup>*Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971).

<sup>62</sup>Specifically, the *Littell* court found that the Secretary of Interior's decision to deny compensation to an attorney for the Navajo Indians was committed by statute to the discretion of the Secretary.

<sup>63</sup>*Littell*, 445 F.2d at 1211.

Judge Friendly's formula from *Wong Wing Hang v. Immigration and Naturalization Service*.<sup>64</sup>

[T]he Secretary's decision here would be an abuse of discretion "if it were made without a rational explanation, inexplicably departed from established policies, or rested . . . on other 'considerations that Congress could not have intended to make relevant.'"<sup>65</sup>

No fewer than four circuits have held explicitly in accord with the *Littell* view that action "committed to agency discretion" can nevertheless be reviewed for arbitrariness or abuse of discretion.<sup>66</sup> Other circuits and the Court of Claims have sometimes engaged in such review without directly addressing the issue.<sup>67</sup>

However, on both sides of the issue, the cases are in considerable confusion and the precise tests applied are almost as varied as the cases. For example, the Ninth Circuit, which generally favors the "absolute non-reviewability" view,<sup>68</sup> on one occasion cited with approval the District of Columbia Circuit's opinion in *Scanwell Laboratories, Inc. v. Shaffer*,<sup>69</sup> which favored review for abuse of discretion, and stated in dictum: "Of course, if there is a patent abuse of the discretion, a court will review the action taken, notwithstanding the language of section 701(a)(2)."<sup>70</sup> On the other

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<sup>64</sup>*Wong Wing Hang v. Immigration and Naturalization Serv.*, 360 F.2d 715 (2d Cir. 1966).

<sup>65</sup>*Littell*, 445 F.2d at 1211 (citing *Wong Wing Hang*, 360 F.2d at 719 (citations omitted)). For a case involving "considerations that Congress could not have intended to make relevant," see *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971).

<sup>66</sup>*Ortego v. Weinberger*, 516 F.2d 1005, 1009 (5th Cir. 1975); *Littell v. Morton*, 445 F.2d 1207, 1211 (4th Cir. 1971); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970); *Wong Wing Hang v. Immigration and Naturalization Serv.*, 360 F.2d 715, 718-19 (2d Cir. 1966); *Suwannee Steamship Co. v. United States*, 354 F. Supp. 1361, 1369 (Cust. Ct. 1973). District courts in the Eighth and Tenth Circuits also have so held. *United States v. 2, 116 Boxes of Boned Beef*, 516 F. Supp. 321, 348-349 (D. Kan. 1981) (which cites approvingly the *Ness* test, see text accompanying notes 73 & 74 *infra*, yet reviews the merits of the exercise of discretion under a "rational basis" standard); *Oahe Conservancy Sub-district v. Alexander*, 493 F. Supp. 1294, 1297-98 (D.S.D. 1980). See also *Velasco v. Immigration and Naturalization Serv.*, 386 F.2d 283, 285-86 (7th Cir. 1967).

<sup>67</sup>For an illuminating account of the extent to which the Court of Claims has been willing to review clearly discretionary decisions in the area of military officer promotions, see *Ellis, Judicial Review of Promotions in the Military*, 98 Mil. L. Rev. 129 (1982).

<sup>68</sup>See *supra* note 49.

<sup>69</sup>*Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

<sup>70</sup>*Reece v. United States*, 455 F.2d 240, 242 (9th Cir. 1972) (indicating that a "strong showing of such abuse" would, however, be required). Cf. *Manges v. Camp*, 474 F.2d 97, 99 (5th Cir. 1973) (despite statutory preclusion of review, held that "a clear departure from designated authority demands judicial review").

hand, in *Krueger v. Morton*,<sup>71</sup> the District of Columbia Circuit, which generally favors review for abuse of discretion,<sup>72</sup> quoted with apparent approval the Ninth Circuit's formulation developed in *Ness Investment Corp. v. United States Department of Agriculture*.<sup>73</sup>

"Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making [of an] informed judgment by the agency."<sup>74</sup>

Use of the term "jurisdiction" in the above formulation seems particularly inappropriate after removal of the amount in controversy requirement for federal question jurisdiction. Yet, the *Ness* test continues to draw favorable comment.<sup>75</sup>

Whatever formulation is applied, it becomes apparent that the issue is not a quasi-jurisdictional question of absolute nonreviewability, but rather a matter of the scope of review to apply in the particular case.<sup>76</sup> For example, in *Strickland v. Morton*<sup>77</sup> the Ninth Circuit applied the *Ness* criteria and concluded:

It may be debatable whether the lands here in question are better suited for agricultural purposes or for some public purposes such as wildlife preservation, wilderness preservation, or outdoor recreation, but appellants having

<sup>71</sup>*Krueger v. Morton*, 539 F.2d 235 (D.C. Cir. 1976).

<sup>72</sup>*E.g.*, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Pillai v. Civil Aeronautics Bd.*, 485 F.2d 1018, 1027 (D.C. Cir. 1973).

<sup>73</sup>*Ness Investment Corp. v. United States Dep't of Agriculture*, 512 F.2d 706, 715 (9th Cir. 1975).

<sup>74</sup>*Krueger*, 539 F.2d at 239 n.8 (citing *Ness*, 512 F.2d at 715) (bracketed material in original).

<sup>75</sup>*E.g.*, *Johnson Oyster Co., Inc. v. Baldrige*, 704 F.2d 1060, 1062 (9th Cir. 1983); *United States v. 2,116 Boxes of Boned Beef*, 516 F. Supp. 321, 348-49 (D. Kan. 1981).

<sup>76</sup>*E.g.*, *Krueger*, 539 F.2d at 238-39 ("Even within the literal confine, jurisdiction has been perceived by regarding the [committed to discretion] exemption *primarily as a limitation to the scope of review*, as not precluding review of agency action that infringes upon some legal mandate and thus is 'arbitrary, capricious, [or an] abuse of discretion, or otherwise not in accordance with law,' or as a *matter of degree*'") (footnotes omitted) (emphasis added).

<sup>77</sup>*Strickland v. Morton*, 519 F.2d 467 (9th Cir. 1975).

raised no issue and having made no showing, that the Secretary in making his classification decision acted contrary to law, or *beyond the limits Congress has put on his discretion*, the district court, under the provision of 5 U.S.C. § 701(a)(2), lacked jurisdiction to hear the case.<sup>78</sup>

Does the emphasized phrase indicate a willingness to review if a sufficiently strong showing of abuse of discretion is made? Use of the disjunctive "or" shows that the phrase means something besides a showing that the decision was "contrary to law." Or does "contrary to law" include an abuse of discretion? At any rate, a failure to show that law was violated or that discretion was abused certainly cannot operate to divest the court of *jurisdiction* to hear the case; instead such failure caused the court to decline to evaluate the merits of the administrative decision made. Accordingly, the second part of the *Ness* formulation seems more accurately to describe, at least in its application, a scope of review test with deference being shown to administrative expertise unless a clear showing of violation or abuse is made.

The confusion and disagreement over the proper way to reconcile sections 701(a)(2) and 706(2)(A) are perhaps inevitable, given the conflict between the literal wording and the apparent congressional purpose. As Judge Friendly has observed:

The difficulty is that if the exception were read in its literal breadth, it would swallow a much larger portion of the general rule of reviewability than Congress could have intended, particularly in light of 5 U.S.C. § 706(2)(A) . . . ; yet to read the exception out completely would do violence to an equally plain Congressional purpose.<sup>79</sup>

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<sup>78</sup>*Id.* at 471-72 (emphasis added).

<sup>79</sup>*Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 302-03 (2nd Cir. 1971).



Although the Second Circuit has tried numerous formulations through the years,<sup>80</sup> it may be hard to improve on the test used in *Wong Wing Hang*,<sup>81</sup> quoted earlier.<sup>82</sup>

Regardless of the various formulations, the probable position of the courts has best been described by Professor Davis: "[A]dministrative action is usually reviewable unless either (a) congressional intent is discernible to make it unreviewable, or (b) the subject matter is for some reason inappropriate for judicial consideration."<sup>83</sup>

Although the Supreme Court never has explicitly held that actions "committed to agency discretion" are reviewable for abuse of discretion, it has rendered opinions which seem to comport with this view.<sup>84</sup> In its landmark case dealing with the "committed to discretion" exception, *Citizens to Preserve Overton Park v. Volpe*,<sup>85</sup>

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<sup>80</sup>The various formulations used in the Second Circuit are summarized in *New York Racing Ass'n, Inc. v. NLRB*, 708 F.2d 46, 50-51 (2d Cir.), *cert. denied*, 104 S.Ct. 276 (1983).

<sup>81</sup>*Wong Wing Hang v. Immigration and Naturalization Serv.*, 360 F.2d 715 (2d Cir. 1966).

<sup>82</sup>See text accompanying note 77. Consider also the following reasoning in *Wong Wing Hang*, which draws upon the work of Professors Hart and Sacks:

Some help in resolving the seeming contradiction may be afforded by the distinction . . . between a discretion that "is not subject to the restraint of the obligation of reasoned decision and hence of reasoned elaboration of a fabric of doctrine governing successive decisions" and discretion of the contrary and more usual sort, . . . ; only in the rare—some say nonexistent—case where discretion of the former type has been vested, may review for "abuse" be precluded.

360 F.2d at 718 (citations omitted).

<sup>83</sup>K. Davis, *Administrative Law Treatise* § 28.16, at 965 (1970 Supp.), *quoted with approval in* *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 303 (2d Cir. 1971).

<sup>84</sup>*Califano v. Sanders*, 430 U.S. 99, 105 (1977) (the effect of amending 28 U.S.C. § 1331(a) to eliminate the amount in controversy requirement, "subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate") (emphasis added); *Mulloy v. United States*, 398 U.S. 410, 415 (1970) ("Though the language of 32 C.F.R. § 1625.2 is permissive, it does not follow that a [selective service] board may arbitrarily refuse to reopen a registrant's classification"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 165-67 (1962) (seeming to ignore the "committed to discretion" exception and allowing review of the ICC's traditionally discretionary function of granting a common carrier's application for interstate operating authority: "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion)") (emphasis in original)).

<sup>85</sup>*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

the Court seemed to side with those favoring such review when it cited with approval Professor Berger,<sup>86</sup> who is one of the chief proponents of the view, and the *Wong Wing Hang* opinion.<sup>87</sup> Significantly, however, in *Overton Park*, the issue does not appear to have been raised<sup>88</sup> and the court concluded that the exception did not apply on the facts of the case.<sup>89</sup>

From the foregoing, it should be clear that the "presumption of reviewability" has made great inroads in the area of review of discretionary administrative decisions, including those "committed to agency discretion by law." Most often, the pertinent inquiry is likely to be a question of the appropriate *scope* of review, rather than whether or not the action is utterly nonreviewable in a jurisdictional sense.<sup>90</sup> In the vast majority of cases, one can expect any discretionary action will be reviewed if challenged to be in violation of the Constitution, a statute, or an agency regulation, or beyond the agency's delegated power. Although the courts are divided on the issue, it is probably the better view in such cases that courts have the power to engage in a very limited review for arbitrariness or abuse of discretion.

### 3. Exceptional Cases

Finally, it must be noted that, despite judicial *power* to engage in review of discretion, there is a longstanding and important body of doctrine that, in certain exceptional cases, courts will decline review. Notwithstanding the presumption of reviewability, discretionary action in such cases becomes absolutely nonreviewable.<sup>91</sup>

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<sup>86</sup>*Id.* at 410 ("This is a very narrow exception. Berger, Administrative Arbitrariness and Judicial Review, 65 Col. L. Rev. 55 (1965)").

<sup>87</sup>401 U.S. at 416.

<sup>88</sup>Respondent Speight, the only one to raise the issue of the applicability of the "committed to discretion" exception, stopped short of contending that agency actions committed by law to agency discretion are not reviewable even if alleged to be arbitrary or capricious because "[p]etitioners have made no charge that any action taken by the Secretary was arbitrary or capricious." Reply Brief of Respondent, Charles W. Speight, Commissioner, Tennessee Department of Highways at 38 n.28 (Yale Law Library), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>89</sup>401 U.S. at 413.

<sup>90</sup>For purposes of this article, which seeks to focus on scope of review, true jurisdictional prerequisites are assumed to be met, as are other barriers to review on the merits such as standing, ripeness, and exhaustion of administrative remedies.

<sup>91</sup>It may be fairly debated whether such "nonreviewability" is a jurisdictional question. Except perhaps for cases at the fringes of separation of powers and the political question doctrine, where "nonjusticiability" is frequently the quasi-jurisdictional term applied, the term "nonreviewability," as used here, is not jurisdictional in the traditional sense. Not only is the court's *power* to review not really at issue, but the factors examined in determining this kind of nonreviewability are usually the factors examined in determining scope of review.

Such cases are rare; they generally involve matters of national security, separation of powers, military or foreign affairs, a matter in which the degree of agency expertise involved makes judicial review inappropriate, or a case in which the fact or precedent of judicial inquiry might impede one of the foregoing interests.<sup>92</sup> It should be noted, however, that holding the above kinds of cases to be utterly nonreviewable is not necessarily inconsistent with the view that actions "committed to agency discretion" are generally subject to review for arbitrariness or abuse of discretion. The District of Columbia Circuit, sitting *en banc* in *Curran v. Laird*,<sup>93</sup> reconciled these concepts as follows:

Furthermore, our decision does not contradict the principle that even where an official action is of a type which generally involves the exercise of discretion the court *has power* to inquire into a claim of abuse of discretion, or use of procedurally unfair and unauthorized techniques, inflicting injury on private citizens. The point of our decision is that there is a narrow band of matters that are wholly committed to official discretion, and that the inappropriateness or even mischief involved in appraising a claim of error or of abuse of discretion, and testing it in an evidentiary hearing, leads to the conclusion that there has been withdrawn from the judicial ambit any consideration of whether the official action is "arbitrary" or constitutes an abuse of discretion.<sup>94</sup>

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<sup>92</sup>*E.g.*, *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (holding that "substantial deference should be accorded prison officials," both because of their expertise and because of separation of powers considerations); *Orloff v. Willoughby*, 345 U.S. 83 (1953) (refusing review of executive branch decision denying inductee-physical a military commission); *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 567 (D.C. Cir. 1970) ("Our decision was made in the context of the general rule, subject only to rare exceptions, that the action of a government agency in the domestic sphere, as contrasted with actions in the spheres of foreign affairs or national security, is subject to judicial review for arbitrariness and abuse of discretion, even though discretion may be broad") (emphasis added); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969) (refusing to review executive branch decision hiring foreign ships and refusing to reactivate ships in the reserve fleet despite Cargo Preference Act requirement that foreign ships not be used to transport American military cargo when American ships are available); *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969) ("purely discretionary decisions by military officials which are within their valid jurisdiction will not be reviewed by this court"); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969) (declining to review the military's refusal to grant a hardship exemption to a ready reservist called to active duty).

<sup>93</sup>*Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969).

<sup>94</sup>*Id.* at 131 (footnote omitted) (emphasis added).

## 4. "No Law To Apply"

Given the steady growth of the presumption of reviewability of administrative decisions, it is hardly surprising that the Supreme Court in *Overton Park*<sup>96</sup> severely restricted the area of application of the committed to discretion exception.<sup>96</sup> What is surprising is the test chosen for determining the exception's applicability. In discussing the exception, the Court stated: "The legislative history of the Administrative Procedure Act indicates that it [the exception] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"<sup>97</sup>

After discussing the case at hand, the court concluded:

"Plainly, there is 'law to apply' and *thus* the exemption for action 'committed to agency discretion' is inapplicable."<sup>98</sup> Use of the word "thus" clearly indicates that, in the Court's view, having "no law to apply" is the *sine qua non* of applicability of the exception. Such a reading is supported by the Court's application of the "no law to apply" test in subsequent cases.<sup>99</sup> Accordingly, after *Overton Park*, the law probably is that where there is "law to apply," agency action cannot be "committed to agency discretion."

It is submitted that this resolution is inappropriate, regardless of whether one views commitment to agency discretion as connoting absolute nonreviewability or merely as posing a limitation on the scope of review, restricting the court to a narrow inquiry for arbitrariness or abuse of discretion. Particularly under the latter view, such a test is unnecessary and ignores a number of cases where policies, external to "the law" at hand, militating against review have resulted in very limited or no review despite the fact that there was "law to apply."<sup>100</sup> In addition, under the former view, where the exception eliminates judicial review of the exercise of discretion, the additional argument may be made that agency actions in which there is no law to apply are often precisely those most in need of

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<sup>96</sup>*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>97</sup>See *supra* note 86 and accompanying text.

<sup>98</sup>*Overton Park*, 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)).

<sup>99</sup>401 U.S. 413 (emphasis added).

<sup>100</sup>*Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979).

<sup>101</sup>See text accompanying note 92 *supra*.

judicial oversight.<sup>101</sup> Thus, the "no law to apply" test can be seen as both overinclusive and underinclusive.

Of most concern is the implication that, whenever there is law to apply, the challenged decision cannot be "committed to agency discretion by law." Because agency regulations probably are a form of "law to apply" and, whether they are or not, courts generally do review to insure compliance with regulations,<sup>102</sup> it will be an unusual case involving a military administrative decision which does not arguably have some law to apply. But, as will be discussed later, many military cases, including some with "law to apply," possess factors justifying a very limited scope of judicial review or no review at all. Such factors have been recognized and effectuated, albeit in varying degrees, throughout the history of judicial review of military determinations.

Limitation of the "committed to discretion" exception to cases of "no law to apply" is based on an erroneous interpretation of the legislative history and is not supported by the cases. The legislative history reads in pertinent part: "The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review."<sup>103</sup> At least two things in this passage are important. First, and most striking, is the emphasized phrase "for example," which was omitted from the excerpt quoted by the Supreme Court in *Overton Park*.<sup>104</sup> "For example" can only mean that other factors besides "no law to apply" may sometimes cause a

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<sup>101</sup>Davis, *Administrative Law Treatise* § 28.16 (1982 Supp.); Davis, *Administrative Law of the Seventies* § 28.16 (1976).

<sup>102</sup>*Vitarelli v. Seaton*, 359 U.S. 535 (1959) (requiring Department of the Interior to comply with its own procedural regulations governing security discharges); *Service v. Dulles*, 354 U.S. 363, 372 (1957) (sustaining the proposition that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature"); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (Attorney General was bound by regulations, issued by him, delegating the discretion to deny suspension of deportation applications to the Board of Immigration Appeals, despite that absent such regulations he would have had discretion to deny the application himself). The plaintiff, however, in order to obtain relief, must show actual prejudice resulting from failure of the agency to comply with its own regulation. In the military context, see, e.g., *Knehans v. Alexander*, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978). There is also support for the proposition that a military regulation is not subject to challenge unless intended for the benefit of the individual affected rather than for the efficient operation of the military. E.g., *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). See also *infra* note 142.

<sup>103</sup>S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945) (emphasis added).

<sup>104</sup>See text accompanying note 97 *supra*.

challenged action to fall within the ambit of the committed to discretion exception. Inexplicably, the Supreme Court rendering reads the phrase "for example" completely out and treats "no law to apply" as the sole criterion for application of the exception. Second, the first sentence in the quoted passage comports with the view that the "committed to discretion" exception in the APA is intended to continue existing, judge-made, law regarding review of discretionary administrative decisions.

As noted above,<sup>105</sup> there are cases, often with law to apply, involving national security, military or foreign affairs, separation of powers, or a high degree of agency expertise, in which courts have quite properly declined entirely to review the exercise of discretion. Similarly, there are cases where the very fact of judicial inquiry, with its concomitant intrusion upon the administrative decision-making process,<sup>106</sup> is seen as having such potential adverse effects sufficient to justify declining to review.<sup>107</sup>

There are at least two Supreme Court cases in which review was denied because the challenged action was "committed to agency discretion" even though arguably there was ample "law to apply." In *Panama Canal Co. v. Grace Line*,<sup>108</sup> the Panama Canal Company construed section 412(b) of the Canal Zone Code, which prescribed the formula for computing tolls, in a manner with which the Comp-

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<sup>105</sup>See *supra* note 92 and accompanying text.

<sup>106</sup>Under the doctrine of *Overton Park* and its progeny, the reviewing court is required to base its decision on the administrative record in existence at the time of the agency decision, rather than on "post hoc rationalizations" created for litigation. At least where the record contains no "contemporaneous explanation of the agency decision," however, the decisionmakers may be ordered to testify or submit affidavits. *Camp v. Pitts*, 411 U.S. 138 142-43 (1973); *Overton Park*, 401 U.S. at 420. This potentially could have an unanticipated and burdensome effect upon the military, because many discretionary military decisions are not conducive to preparation of the typical administrative record.

<sup>107</sup>See Saferstein, *supra* note 48, at 374-77.

<sup>108</sup>*Panama Canal Co. v. Grace Line*, 356 U.S. 309 (1958).



troller General and, ultimately, Grace Line disagreed.<sup>109</sup> When Grace Line sought to force the Company to initiate proceedings for readjustment of the tolls, a unanimous Supreme Court recognized that the issues involved "problems of statutory construction and cost accounting."<sup>110</sup> Nonetheless, the Court held that the matter was within the committed to discretion exception and refused to review, based on deference to agency expertise and on the fact that "[w]e deal here with a problem in the penumbra of the law where generally the Executive and the Legislative are supreme."<sup>111</sup>

The Supreme Court also had "law to apply" in *Schilling v. Rogers*,<sup>112</sup> but nevertheless concluded that the challenged action was "committed to agency discretion" and refused to review. At issue was the proper construction of the phrase "political, racial, or religious groups" in section 32(a)(2)(D) of the Trading with the Enemy Act.<sup>113</sup> The Director of the Office of Alien Property had concluded that "[a]nti-Nazis and non-Nazis do not constitute a political group;"<sup>114</sup> the Court found this determination unreviewable. The precedential value of *Schilling* for our purposes, however, may be somewhat reduced because the Court explicitly based its decision to deny judicial review both on commitment to agency discretion and statutory preclusion grounds.<sup>115</sup>

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<sup>109</sup>Canal Zone Code, (Cit. 2, § 412(b), as amended by 64 Stat. 1038 (1950), provided:

Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

356 U.S. at 313. The dispute arose because the Comptroller General interpreted the provision as written to mean that tolls had to be computed exclusively based on the cost of operating the Canal, without taking into account the losses incident to various auxiliary or supporting activities. Such a computation method would have lowered tolls significantly. Predictably, the Company disagreed with this statutory interpretation.

<sup>110</sup>*Panama Canal Co.*, 356 U.S. at 317.

<sup>111</sup>*Id.* at 317.

<sup>112</sup>*Schilling v. Rogers*, 363 U.S. 666 (1960).

<sup>113</sup>50 U.S.C. App. §§ 1-44 (1976).

<sup>114</sup>*Schilling*, 363 U.S. at 670 n.8. A contrary conclusion would have been essential for the petitioner's successful recovery.

<sup>115</sup>*Id.* at 670, 676.

Several courts of appeal decisions also illustrate that the presence of "law to apply" does not necessarily prevent an action from being "committed to agency discretion." In *Curran v. Laird*,<sup>116</sup> at issue was the Cargo Preference Act of 1956,<sup>117</sup> which forbids use of foreign vessels to transport American military cargo when American ships are available. In declining to review an executive branch decision hiring foreign ships and refusing to reactivate American ships in the reserve fleet,<sup>118</sup> the District of Columbia Circuit, *en banc*, held the decision "committed to agency discretion," reasoning that

[t]he case involves decisions relating to the conduct of national defense; the President has a key role; the national interest contemplates and requires flexibility in management of defense resources; and the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility.<sup>119</sup>

Significantly, in a 1979, post-*Overton Park* case,<sup>120</sup> the District of Columbia Circuit again considered the "committed to discretion" exception and made clear that it did not consider "no law to apply" to be the sole criterion for the exception's applicability: "The exemption for 'action committed to agency discretion by law' has been construed narrowly—for cases where there is no law to apply or for extraordinary circumstances, such as those requiring flexibility in managing the resources of national defense."<sup>121</sup> The court both cited *Overton Park* and quoted *Curran v. Laird*.<sup>122</sup>

*United States ex rel. Schonbrun v. Commanding Officer*<sup>123</sup> is a case in which the "law" consisted of Army regulations. The Second Circuit denied review of the Army's refusal to grant Schonbrun, a member of the ready reserves, an exemption from active duty because of extreme personal and community hardship. The court found the decision to be committed to discretion despite fairly

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<sup>116</sup>*Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969).

<sup>117</sup>10 U.S.C. § 2631 (1982).

<sup>118</sup>The reserve fleet legislation involved was 50 U.S.C. App. § 1744(a) (1976) (current version at 50 U.S.C. App. § 1744a (Supp. V 1981)).

<sup>119</sup>*Curran*, 420 F.2d at 129.

<sup>120</sup>*Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 981 (1980).

<sup>121</sup>*Id.* at 8 (emphasis added). See also *Natural Resources Defense Council, Inc. v. S.E.C.* 606 F.2d 1031, 1043-44 (D.C. Cir. 1979).

<sup>122</sup>*Investment Annuity*, 609 F.2d at 8 n.34 (citing *Curran v. Laird*), 8 & n.33 (quoting *Overton Park*) (footnotes omitted).

<sup>123</sup>403 F.2d 371 (2d Cir. 1968) (Friendly, *cert. denied*, 394 U.S. 929 (1969)).

detailed exemption criteria in the regulations<sup>124</sup> and despite that Schonbrun's complaint alleged abuse of discretion. The court openly acknowledged its fear of "a flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these."<sup>125</sup> The court decided that "administration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide."<sup>126</sup>

The more typical cases involving commitment to agency discretion despite the presence of applicable regulations concern either decisions made to fill in gaps left by regulation or decisions made where the regulation fails to provide meaningful criteria facilitating judicial review.<sup>127</sup> Even in these cases, as the Third Circuit has acknowledged: "It should be noted that the inclusion in the statutory scheme of some specific standard as a guide to administrative decision-making does not necessarily mean that the matter is reviewable. See *Schilling v. Rogers*, . . . ."<sup>128</sup>

## B. REVIEW OF MILITARY DISCRETION

Although the issue is not free from doubt, enactment of the APA probably did not change previously existing law regarding judicial review of administrative decisions. The Senate Committee Report concerning the APA stated of "Section 10," which contained the precursors of present day sections 701 to 706 governing judicial review: "This section, in general, declares the existing law concern-

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<sup>124</sup>Excerpts from the pertinent Army regulation are quoted in *Schonbrun*, 403 F.2d at 372 n.1. It might be argued that the regulations did not require exemption even if the explicit criteria were met, and that, therefore, there was no law to apply as to the ultimate decision to grant or withhold relief. Such was not the basis, however, of either the Army's or the court's decision. The military appeals board denied relief because "the case did not meet the criteria for exemption from involuntary call to active duty as established in" the Army regulation. *Id.* at 373. The court refused review of the correctness of even this conclusion.

<sup>125</sup>*Id.* at 375.

<sup>126</sup>*Id.* at 374-75.

<sup>127</sup>See, e.g., *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3d Cir. 1979) (refusing review of Army decision to contract out to a private concern services previously performed by government employees); *AFGE v. Hoffman*, 427 F. Supp. 1048 (N.D. Ala. 1976) (similar issue); *Sellas v. Kirk*, 200 F.2d 217 (9th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953) (refusing to review land classifications made under the Taylor Grazing Act and regulations promulgated thereunder).

<sup>128</sup>*Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 578 n.10 (3d Cir. 1979) (quotation from *Schilling* omitted).

ing judicial review."<sup>129</sup> Of section 10(e), present day section 706 governs scope of review, the history states: "This declares the existing law concerning the scope of judicial review."<sup>130</sup> However, the Supreme Court in *Heikkila v. Barber*<sup>131</sup> cited an apparently conflicting House Committee Report and concluded:

The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality toward the claim that § 10 greatly expanded the availability of judicial review. However such generalities are not dispositive of the issues here, else a balance would have to be struck between those in the Committee reports and material in the debates which indicates inconsistent legislative understandings as to how extensively § 10 changed the prior law on judicial review.<sup>132</sup>

The law since has developed the presumption of reviewability to the point where "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."<sup>133</sup> But this broadening of the *availability* of review has not greatly changed the general *scope* of review existing at the time of enactment of the APA, and the broadening of availability has occurred primarily through judicial extension. Thus, Professor Davis, writing in the 1950s, accurately presaged both the source and the direction of the development:

The words of the introductory clause of section 10 add up to the simple idea that the courts in the future as in the past will continue to be the principal architects of the law of reviewability . . . . Not only are the courts free to go on strengthening the presumption of reviewability, as they have been doing in recent decades, but they are likely to go on so doing. If so, the sound reason is an independent judicial judgment about the merits of reviewability in particular contexts, and not a supposed congressional mandate through the APA.<sup>134</sup>

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<sup>129</sup>S. Rep. No. 752, 79th Cong., 1st Sess. 43 (1945).

<sup>130</sup>*Id.* at 44.

<sup>131</sup>345 U.S. 229 (1953).

<sup>132</sup>*Id.* at 232-33.

<sup>133</sup>*Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (quoting the "clear and convincing evidence" standard applied in *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)).

<sup>134</sup>Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 432-33 (1958). *Accord* Jaffe, *supra* note 48, at 372 ("The Administrative Procedure Act has had a negligible effect on the basic right to judicial review. The act does have, however, the merit of codifying the presumption of reviewability").

The fact that, absent a specific controlling statute, the APA does not divest courts of their inherent power to determine the availability and scope of judicial review is important because of the judicially created "doctrine of nonreviewability" of military administrative decisions. Although this historical doctrine has been weakened substantially in recent years, the reasons underlying its development are a key to distinguishing those present-day discretionary military decisions which deserve judicial deference over and above that received by other administrative agencies.

*1. Opposing Presumptions: "Nonreviewability" as It Survives Today*

A masterfully thorough treatment of the doctrine of nonreviewability was provided by Colonel Darrell Peck in his 1975 study of the subject.<sup>135</sup> Colonel Peck traced the history of the doctrine in the Supreme Court from *Decatur v. Paulding*<sup>136</sup> in 1840 through the early 1970s. As he aptly demonstrated, the phrase "doctrine of nonreviewability," in the sense that military administrative decisions were "absolutely exempt from judicial review," is inaccurate because of the Supreme Court's consistent view that "certain challenges to military activities are not reviewable but that others are."<sup>137</sup>

At one time, the courts readily applied the doctrine of nonreviewability to avoid review of almost any challenge to military administrative action. Extreme statements from the Supreme Court such as "[t]o those in the military or naval service . . . military law is due process"<sup>138</sup> encouraged reflex application of the doctrine by lower courts. However, as the presumption of reviewability of administrative action generally developed, so did the willingness of courts to review military determinations.

Decisions in the last half century have greatly reduced the scope of the doctrine's applicability. Today, military administrative decisions generally are reviewable when challenged on jurisdictional

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<sup>135</sup>Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1 (1975). Those interested in a detailed history of the doctrine, or in its applicability over the years to military administrative decisions in general, should consult Colonel Peck's article. This article concentrates primarily on the doctrine as it impacts upon judicial review of military discretion.

<sup>136</sup>39 U.S. (14 Pet.) 497 (1840).

<sup>137</sup>Peck, *supra* note 135, at 77.

<sup>138</sup>*Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911).

grounds,<sup>139</sup> or for violation of the Constitution,<sup>140</sup> statute<sup>141</sup> or regulation.<sup>142</sup> When, however, the challenge goes to the substantive merits of a decision validly committed to military discretion, the nonreviewability doctrine appears alive and well, with courts most frequently refusing review of such an issue altogether or using a restrictive standard of review such as "arbitrary and capricious,"<sup>143</sup> "abuse of discretion,"<sup>144</sup> or, presumably the most restrictive, "any basis in fact."<sup>145</sup>

The Supreme Court has upheld the discretionary power of a military commander to exclude persons summarily from the area of his command.<sup>146</sup> Similarly, it has eschewed any judicial role in supervising training and readiness of the military.<sup>147</sup> Indeed, the Supreme Court cases have strikingly juxtaposed the generally increasing presumption of reviewability of administrative actions<sup>148</sup> with a pre-

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<sup>139</sup>*E.g.*, *Harmon v. Brucker*, 355 U.S. 579 (1958) (holding that the Secretary of the Army acted in excess of his statutory powers when he issued discharge certificates which took into account service members' pre-service activities).

<sup>140</sup>*E.g.*, *Greer v. Spock*, 424 U.S. 828 (1976); *Parker v. Levy*, 417 U.S. 733 (1974); *Flower v. United States*, 407 U.S. 197 (1972) (per curiam); *Curry v. Secretary of the Army*, 595 F.2d 873 (D.C. Cir. 1979); *Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974).

<sup>141</sup>*E.g.*, *Bell v. United States*, 366 U.S. 393 (1961); *Greene v. McElroy*, 360 U.S. 474 (1959). *Cf.* *Barlow v. Collins*, 397 U.S. 159 (1970) (where controversy is over meaning of statutory terms, judicial review is particularly appropriate).

<sup>142</sup>Federal courts generally will require plaintiff to show both that the regulation was promulgated for the benefit of the individual plaintiff, rather than for the efficient operation of the military, and that plaintiff was prejudiced by the military's noncompliance with the regulation. As to the former, *see, e.g.*, *Silverthorne v. Laird*, 460 F.2d 1175, 1186 (5th Cir. 1972); *Allgood v. Kenan*, 470 F.2d 1071, 1073-74 (9th Cir. 1972). As to the latter, *see, e.g.*, *Bensing v. United States*, 551 F.2d 262, 265 (10th Cir.), *cert. denied*, 434 U.S. 832 (1977); *Johnson v. Chafee*, 469 F.2d 1216, 1219 (9th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). *See also supra* note 102.

<sup>143</sup>*E.g.*, *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1037 (3d Cir. 1981); *American Federation of Government Employees v. Hoffman*, 427 F. Supp. 1048, 1084 (N.D. Ala. 1976). *Cf.* *Robinson v. Resor*, 469 F.2d 944 (D.C. Cir. 1972) (holding discharge under other than honorable conditions denied procedural due process and substantive justice although all requirements technically were met).

<sup>144</sup>*E.g.*, *Reece v. United States*, 455 F.2d 240, 242 (9th Cir. 1972).

<sup>145</sup>*E.g.*, *United States ex rel. Hutcheson v. Hoffman*, 439 F.2d 821, 823-24 (5th Cir. 1971); *Beatty v. Kenan*, 420 F.2d 55, 60 (9th Cir. 1969); *Hammond v. Lenfest*, 398 F.2d 705, 716 (2d Cir. 1968).

<sup>146</sup>*Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961); *Greer v. Spock*, 424 U.S. 828 (1976). *Cf.*, *Brown v. Glines*, 444 U.S. 348 (1980) (upholding Air Force regulation prohibiting circulation of petitions on base without base commander's approval).

<sup>147</sup>*Gilligan v. Morgan*, 413 U.S. 1 (1974).

<sup>148</sup>*See supra* notes 39 & 40 and accompanying text.



sumption of nonreviewability in cases seeking review of the merits of an exercise of military discretion.<sup>149</sup>

In his study, Colonel Peck reached a similar conclusion. Indeed, after explaining that "nonreviewability" is dead or dying as to most kinds of challenges, he concluded that the doctrine remains viable, if not determinative insofar as the Supreme Court is concerned, when military action is challenged as an abuse of discretion: "If the Supreme Court decisions which have been examined are still valid, in fact, it is difficult to avoid the conclusion that the factual basis of a military action is completely nonreviewable. Many lower federal courts do review the factual basis, however."<sup>150</sup> Since Colonel Peck wrote in 1975, no Supreme Court holding has indicated any greater willingness to review the "factual basis"—that is, the merits—of discretionary military decisions.<sup>151</sup>

Although the tests used are hardly consistent, and the results obtained are even less so, the lower courts have generally shown greater deference to military discretion than to that of other agencies. Among the most prominent cases is the often-cited decision in *Mindes v. Seaman*.<sup>152</sup> In *Mindes*, the Fifth Circuit reviewed the case law and

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<sup>149</sup>See, e.g., *Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976) (referring to the "presumption of unreviewability" in denying mandamus petition of Army Reserve physician called to active duty). Opposing presumptions are not unheard of, as the current state of the law of mandamus demonstrates. The traditional prerequisites to a successful action for mandamus—clear right, clear duty, and that the duty is ministerial rather than discretionary—operate in effect as a presumption against reviewability by putting the burden on the plaintiff to show clearly that the requirements are met. This presumption is opposed by the modern presumption of reviewability of administrative action, which has the effect generally of putting the burden on the administrator to show clearly a legislative intention to make his action unreviewable. How these opposing presumptions are to be reconciled today in the mandamus area remains something of an open question.

<sup>150</sup>Peck, *supra* note 135, at 68. Colonel Peck advocated a sophisticated balancing approach, derived loosely from *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), in determining the reviewability of military administrative decisions for abuse of discretion.

<sup>151</sup>But see dictum in *Chappell v. Wallace*, 103 S.Ct. 2362, 2367 (1983) (indicating that decisions of the Board for the Correction of Naval Records "are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence"); *Brown v. Glines*, 444 U.S. 348, 357 n.15 (1980) (similar dictum in First Amendment context).

<sup>152</sup>453 F.2d 197 (5th Cir. 1971). Numerous courts have cited approving the *Mindes* decision, and the Eighth, Ninth and Eleventh Circuits have followed the *Mindes* test. *Rucker v. Secretary of the Army*, 702 F.2d 966 (1st Cir. 1983); *Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1273 (1983); *Schlanger v. United States*, 586 F.2d 667 (9th Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). But see *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981) (rejecting the *Mindes* test because it "intertwines the concept of justiciability with the standards to be applied to the merits of the case").

distilled the primary conclusion that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures. The second conclusion, and the more difficult to articulate, is that not all such allegations are reviewable.<sup>153</sup>

Only if the claim asserted passed this first test did the court then need to examine four other factors: "[1] the source and weight of the plaintiff's challenge, [2] the injury to plaintiff if review were denied, [3] the amount of interference with military matters if relief were granted, and [4] the degree to which military expertise and discretion are involved."<sup>154</sup>

Significantly, a challenge solely for abuse of military discretion—that is, that a clearly wrong decision was made but that no constitutional, statutory, or regulatory violation occurred—would not appear to pass the first step of the *Mindes* test.<sup>155</sup> However, the *Mindes* court elsewhere quoted approvingly from another Fifth Circuit decision: "*Whether the Post Commander acts arbitrarily or capriciously, without proper justification, is a question which the courts are always open to decide.*"<sup>156</sup>

Predictably, the courts are split in military cases on the question of whether decisions "committed to agency discretion" may be reviewed for abuse of discretion.<sup>157</sup> Even those courts of appeal which generally favor availability of some review of discretionary decisions are often loathe to examine military decisions. Almost invariably, review of the correctness of the exercise of military discretion either is flatly denied or is given only a highly deferential review.<sup>158</sup>

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<sup>153</sup>453 F.2d at 201.

<sup>154</sup>*Johnson v. Reed*, 609 F.2d 784 (5th Cir. 1980) (summarizing the *Mindes* factors).

<sup>155</sup>Note also that, as to the four factors in the second step, the *Mindes* court cautioned that "[a]n obviously tenuous claim of any sort must be weighted in favor of declining review," and, as to the third factor, "if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief." 453 F.2d at 201.

<sup>156</sup>*Id.* at 200 (quoting *United States v. Flower*, 452, F.2d 80, 86, (5th Cir. 1971), *rev'd per curiam*, 407 U.S. 197 (1972) (emphasis in *Flower*)).

<sup>157</sup>See *supra* notes 48-89 and accompanying text discussing the dispute over whether decisions "committed to agency discretion" are nevertheless reviewable for abuse of discretion.

<sup>158</sup>E.g., *Ornato v. Hoffman*, 546 F.2d 10 (2d Cir. 1976); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969).

Another concept developed by the courts is the notion that, in some cases, judicial review should be withheld entirely because the intrusion necessitated by any judicial review at all may impact adversely upon the military mission. In this view, courts should consider not only the potential interference with military matters resulting from granting the requested relief, but also the interference necessitated by the mere act of judicial review, regardless of outcome.<sup>159</sup> The *Mindes* court noted this concern: "But the greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission."<sup>160</sup> Since many discretionary decisions in the military are made without producing an administrative record, even review for "abuse of discretion" often will require substantial intrusion upon the decisionmaking process. A contrary view "assume[s] that abuses of discretion leap from the pleadings, and that all a court need do to remedy an abuse is to reverse summarily."<sup>161</sup>

From the foregoing, it should be clear that, although courts occasionally will review the merits of a discretionary military administrative decision, on balance the military continues to receive greater judicial deference than most agencies. Even where challenges allege violations of statute, regulation, or the like, judicial review is not automatically available, as the *Mindes* balancing approach indicates.

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<sup>159</sup>*Cf.* *United States v. Brown*, 348 U.S. 110, 112 (1954) ("The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders or negligent acts committed in the course of military duty, led the Court [in *Feres v. United States*, 340 U.S. 135 (1950)] to read that Act as excluding claims of that character") (emphasis added).

<sup>160</sup>453 F.2d at 199. *Accord* *Rucker v. Secretary of the Army*, 702 F.2d 966, 969 (11th Cir. 1983); *Curry v. Secretary of the Army*, 595 F.2d 873, 880 (D.C. Cir. 1979) ("The need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence"); *Curran v. Laird*, 420 F.2d 122, 133 n.26 (D.C. Cir. 1969). See *Saferstein*, *supra* note 48. *Cf.* *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 567 (D.C. Cir. 1970) ("sometimes, albeit rarely, Congress has made issues nonreviewable in court because the very process of judicial consideration in the particular circumstances requires the statement of reasons and explanations of matters that Congress wishes held in confidence").

<sup>161</sup>*Saferstein*, *supra* note 48, at 374, quoted with approval in *Curran v. Laird*, 420 F.2d 122, 133 (D.C. Cir. 1969). *Cf.* *Warren, The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962) ("[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal").

## 2. The Rationale for Deferential Treatment

Why do the courts tend to defer to the military's discretion more readily than to the discretion of most other agencies? The cases are in such disarray that it is extremely difficult to reconcile them and divine some guiding principle. Indeed, classification by broad types of cases or issues would be a possible starting point,<sup>162</sup> but the principles enunciated in cases withholding review of military discretion seem to cut across such categories. Not only is it extremely doubtful that courts either do or should decide the availability and scope of review of discretion in such manner, *e.g.*, basing the scope of review in one case upon the fact it is a "personnel case," while another case receives a different level of review because it is a "contracting case," there is no inherent reason why, where the agency validly has discretion,<sup>163</sup> the type of case or issue involved should be any more than a factor to be considered.

From the cases may be divined at least that there are generally two lines of reasoning used to limit or deny judicial review of military discretionary decision. Although both lines of reasoning often appear in the same case, they are distinct. First, there are reasons for denial or restriction of review which are of application to all administrative agencies, of which the military is just one. Second, there are reasons peculiar to the fact it is the military which is involved. The dual rationales reflect the nature of today's military in its roles as military *qua* administrative agency and military *qua* military.

As regards the military's role as administrative agency, the various reasons for judicial deference to agencies generally<sup>164</sup> continue to be valid when the military is the agency involved. For example, where the challenged decision involves a question of "agency expertise" outside the normal judicial competence, courts have not hesitated to show the military a deference at least equal to that shown other agencies, either by denying review of the substantive merits of the

<sup>162</sup>*E.g.*, Some of the chapter headings in U.S. Dep't of Army, Pamphlet No. 27-21, Military Administrative Law Handbook (15 May 1980), suggest possible categories: "military personnel law," "law of federal labor relations," "personal property," "law of military installations," including *inter alia* "environmental law." Peck, *supra* note 134, at 78, denominates five broad categories of cases, with subcategories, based upon the nature of the challenge to military administrative action: lack of jurisdiction over the person, violation of statutory authority, violation of its own regulation, violation of the Constitution, and abuse of discretion.

<sup>163</sup>"Discretion," by definition, leaves the decisionmaker free to choose among possible courses of action or inaction. See *supra* note 9 and accompanying text.

<sup>164</sup>See *supra* note 92 and accompanying text.

decision altogether or by using an extremely deferential scope of review.<sup>165</sup>

The second category, where the fact that the military is involved justifies withholding or severely limiting judicial review, provokes greater discussion. It might be argued that this attitude simply comports with the normal deferential treatment given the decision of any agency when national security is implicated.<sup>166</sup> It is generally true that, where the national security is involved, the courts tend to show great restraint, regardless of the agency involved; arguably, the question may only be a matter of degree. But there is also a qualitative difference; where the military's unique role as the military is involved, the national security is *presumptively* implicated. That fact distinguishes the "military *qua* military" from most other agencies. An awareness of this distinction, although not always expressed, seems to underlie many of the leading cases.

A leading exponent of this view is *Orloff v. Willoughby*,<sup>167</sup> in which Justice Jackson wrote for the majority:

[J]udges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.<sup>168</sup>

This philosophy is closely allied to that behind *Reaves v. Ainsworth*,<sup>169</sup> which included the cogent observation that

[t]he courts are not the only instrumentalities of government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army.<sup>170</sup>

<sup>165</sup>*E.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1974); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969).

<sup>166</sup>*See supra* note 92 and accompanying text.

<sup>167</sup>345 U.S. 83 (1953) (refusing review of executive branch decision denying inductee-physician a military commission).

<sup>168</sup>*Id.* at 93-94. Just last term, by quoting it with approval, the Supreme Court left no doubt that this passage remains "good law." *Chappell v. Wallace*, 103 S.Ct. 2362, 2366 (1983).

<sup>169</sup>219 U.S. 296 (1911) (refusing to review Army medical board's decision that officer was unfit for promotion, even though the decision resulted in his discharge from the service).

<sup>170</sup>*Id.* at 306.

Indeed, "the different character of the military community and of the military mission" still justifies according constitutional protections to service members which are qualitatively different from those accorded their civilian counterparts: "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."<sup>171</sup>

Fundamentally, such deference to military discretion is justifiable only by reference to the unique mission of the military. The military's *raison d'être* is "to fight or be ready to fight"<sup>172</sup> our nation's wars. Understandably, the greatest judicial deference to military decisionmakers tends to be shown in wartime, when the very fate of the nation may be at stake. Although their assumed factual predicate was certainly wrong, the now-familiar Japanese-internment cases<sup>173</sup> illustrate the extent to which even the Supreme Court may allow Executive Branch infringement of constitutional liberties in times of perceived crisis. However, *Cafeteria and Restaurant Workers Union v. McElroy*,<sup>174</sup> *Gilligan v. Morgan*,<sup>175</sup> and *Chappell v. Wallace*<sup>176</sup> have shown that the underlying rationale is not limited to cases of wartime crisis; military *readiness* for combat is also encompassed.<sup>177</sup>

In *Cafeteria Workers*, the Supreme Court upheld the summary exclusion of a civilian cafeteria worker from a naval base for security reasons. Although the Court based its decision largely on the historical right of a commander to exclude persons from the area of his command, the Court linked this prerogative to military readiness when it quoted approvingly the following:

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<sup>171</sup>Parker v. Levy, 417 U.S. 733, 758 (1974) (upholding under constitutional attack Articles 133 and 134 of the Uniform Code of Military Justice, which make conduct unbecoming an officer and gentleman, and disorders and neglects to the prejudice of good order and discipline, respectively, criminally punishable).

<sup>172</sup>United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

<sup>173</sup>Korematsu v. United States, 323 U.S. 214 (1944) (upholding constitutionality of Civilian Exclusion Order No. 34, which directed the exclusion of all persons of Japanese ancestry from a specified West Coast military area after May 9, 1942); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding constitutionality of curfew order applicable only to persons of Japanese ancestry).

<sup>174</sup>367 U.S. 886 (1961).

<sup>175</sup>413 U.S. 1 (1974).

<sup>176</sup>103 S.Ct. 2362 (1983).

<sup>177</sup>Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969) is also illustrative, although not a Supreme Court case. It occurred during the Vietnam War and the military cargo involved doubtless was bound for Vietnam, but readiness for potential conflict elsewhere (or at least for additional conflict beyond the then-prevailing level in Vietnam) was at the heart of the disputed decision not to break out the reserve fleet.



"It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe *in the interest of good order and military discipline* (1918 Dig. Op. J.A.G. 267 and cases cited)." JAGA 1925/680.44, 6 October 1925.<sup>178</sup>

In *Gilligan v. Morgan* following the fatal shooting of student protesters at Kent State University by Ohio National Guardsmen, plaintiffs sought *inter alia* continuing judicial surveillance via injunctive and supervisory relief over the training, weaponry, and standing orders of the Ohio National Guard. In holding the controversy to be nonjusticiable, the Court gave constitutional dimension to the argument that military readiness is not a proper judicial concern: "The relief sought by respondents, requiring judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government."<sup>179</sup> Accordingly, the Court refused such a role.

In *Chappell v. Wallace*, the Supreme Court refused to create a tort remedy in favor of enlisted members who alleged violations of their constitutional rights by military superiors. The Court recognized that, in order to achieve combat readiness, "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate and reflection."<sup>180</sup>

Such judicial deference where military readiness is concerned is altogether proper. Not only is it true that peacetime readiness generally determines the price of wartime victory and, indeed, may be the difference between victory and defeat. Accordingly, in ap-

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<sup>178</sup>367 U.S. at 893 (emphasis added). Significantly, the Court did seem to apply some minimum rationality standard of review in response to the claim of violation of due process, when it stated:

We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with [her employer] M & M.

*Id.* at 898.

<sup>179</sup>413 U.S. at 7.

<sup>180</sup>103 S.Ct. at 2365. See also *infra* note 181 and accompanying text.

propriate cases, the military imperatives of discipline and combat readiness demand a judicial deference unlike that due other governmental agencies. As the Supreme Court so aptly and recently stated in *Chappell*:

*[C]onduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.<sup>181</sup>*

### 3. *Toward a Consistent Methodology*

As earlier demonstrated, the growth of the presumption of reviewability in administrative law makes expansive judicial intrusion into the realm of military discretion a very real possibility today. Indeed, a number of courts already have reviewed the merits of discretionary military decisions for arbitrariness and abuse of discretion; some have applied the substantial evidence standard to such a decision.<sup>182</sup> The dual nature of today's military, as administrative agency and as fighting force, makes such review appropriate in some cases for some issues, and inappropriate in others. A methodology by which courts can discern the inappropriate from the appropriate cases is therefore required.

In determining the appropriate scope of review, traditional analysis proceeds along the question of whether the central issue in-

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<sup>181</sup>103 S.Ct. at 2365 (emphasis added). See Peck, *supra* note 135, at 76:

The military's need for discipline and obedience is undoubtedly its major difference from civilian society; few men will follow an order which causes them to confront injury and death so directly unless the habit of obedience has been thoroughly instilled. Thus, there is a special need to restrict activities which foster disobedience, open disrespect for authority, or otherwise undermine discipline.

<sup>182</sup>*Johnson v. Reed*, 609 F.2d 784, 791 (5th Cir. 1980), and *Sanders v. United States*, 594 F.2d 804, 818 (Ct. Cl. 1979), both require, when information has been improperly excluded from a promotion board file, that a nonselection for promotion be voided unless "substantial evidence shows that it was unlikely that the officer would have been promoted in any event."

volves a question of law or a question of fact.<sup>183</sup> Such categorizations, however, are not helpful in cases of military administrative decisionmaking.<sup>184</sup> Furthermore, many discretionary military decisions cannot be classified as either tradition adjudication or rulemaking; often there are no witnesses for the "factfinder" to observe and frequently little or no record may be produced. A more useful methodology begins by focusing on the particular claim or claims made and the nature and breadth of the military's discretion in the case at hand.<sup>185</sup>

As with review of any agency's decisions, each issue raised in a military case should be examined separately; some issues are far more appropriate than others for deferential treatment. Questions of constitutional or statutory rights, of the limits of jurisdictional authority, and of military compliance with many of its regulations<sup>186</sup> generally will be reviewed broadly by the courts. As demonstrated earlier,<sup>187</sup> however, in appropriate cases of this type, even those with "law to apply," the decision may be characterized as committed to discretion and accorded a very restrictive or no judicial review. Such exceptions consistently reflect the second of the above-noted considerations: the nature and breadth of military discretion applicable in the particular case. In general, however, the persuasiveness of the military argument for deferential review will vary with the particular issue raised, even within the context of action "committed to agency discretion."

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<sup>183</sup>Traditionally, questions of fact receive a limited, deferential, judicial review, while questions of law receive a substantially independent judicial review. See Davis, *supra* note 7, at chs. 29, 30.

<sup>184</sup>Peck, *supra* note 135, at 68, reaches a similar conclusion as to the unhelpfulness of the question of law/question of fact dichotomy. Consider also the examples presented in the text accompanying notes 10-18, *supra*.

<sup>185</sup>Professor Byse has described the analysis more generally as follows:

Despite the various verbal formulations and the range of possibilities between 0 per cent and 100 per cent review, there are two basic, threshold questions which should be resolved in every case in which the scope of judicial review is at issue. The first question is what precisely is the alleged error the complaining party contends the agency has committed. The second question is what is the scope of the power or discretion which the legislature has delegated to the agency. Only after these questions have been answered can the court intelligently determine what its scope of review shall be—or, in other words, what its responsibility is and what the agency's responsibility is.

Byse, *The Availability and Scope of Judicial Review of Administrative Action by Ordinary Courts*, in *Law in the United States of America in Social and Technological Revolution* 543, 560 (1974).

<sup>186</sup>See *supra* notes 102 & 142 and accompanying text.

<sup>187</sup>See *supra* notes 95-128 and accompanying text.

Beyond alleged jurisdictional, constitutional, statutory, or regulatory violations, there are challenges to the exercise of discretion itself. By concentrating on the unique mission of the military *qua* military in contrast with the functions of other administrative agencies, it is possible to explain which of the military's discretionary decisions deserve greater judicial deference than the corresponding decisions of other agencies.

Those cases posing issues closest to the traditional purposes of and reasons for having an armed force are most susceptible to proper characterization as "nonreviewable" or committed to agency discretion.<sup>188</sup> The APA illustrates the point, as military decisions in the field in wartime or in occupied territory are specifically exempted from operation of that statute.<sup>189</sup> Such a view is essential, both in cases within and without the APA, in light of the military mission in combat and its vital importance to the nation.

It is in combat that the unique requirements of the military, such as discipline, unhesitating obedience, mutual loyalty between superior and subordinate, and selfless devotion to duty, can brook no interference from outside sources without risk to the security of the nation itself. This is true, moreover, whether the interference springs from actual judicial intrusion or simply from the inhibiting specter of judicial precedent allowing review.<sup>190</sup> Accordingly, where the challenge was brought by one lawfully in the service, the courts have uniformly refused to review challenges to assignment to and

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<sup>188</sup>It is at this end of the spectrum that scope of review seems to shade into a quasi-jurisdictional notion. Loose use of the term "jurisdiction" by courts and commentators occasionally casts the issue as one of the power of the court to review. "Non-reviewability" as it survives today, however, and as used in this article is more accurately a decision declining to exercise recognized jurisdiction in the court to review. As such, "nonreviewability" is the most deferential scope of review possible. "Committed to agency discretion," as demonstrated earlier, triggers the next most deferential scope of review, with some courts treating such decisions as nonreviewable, while others review using a restricted standard such as arbitrariness, abuse of discretion, or the like.

<sup>189</sup>5 U.S.C. §§ 551(1)(G), 701(b)(1)(G) (1982).

<sup>190</sup>See *supra* notes 159-61 and accompanying text.

relief from particular duty,<sup>191</sup> to adequacy of training,<sup>192</sup> or to executive branch decisions committing military resources.<sup>193</sup>

As one moves away from combat-related activity, the persuasiveness of the military's claim to special treatment varies proportionally with the inherently "military" nature of the challenged discretionary action. The more able the military is to show a connection between its exercise of discretion and *military readiness*, the more deferential should be the judicial treatment. This is not to say that, where the challenge is to the exercise of discretion, other factors, such as the nature of the claim asserted or the potential harm to the plaintiff, should not be considered; the judiciary in recent years has left no doubt that such factors will be given their due weight.<sup>194</sup> It is stated rather as a reminder that many factors, direct and indirect, impact upon military readiness, that military readiness is directly related to performance in war, and that the military's performance in war is an issue of national survival. Undoubtedly, that is why the cases generally reflect the fact that the military is not just another administrative agency. Where an appropriate relation to military readiness may be shown, the military's exercise of discretion generally deserves and receives greater deference than that of other agencies.<sup>195</sup>

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<sup>191</sup>*E.g.*, *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972) (refusing relief from transfer order despite allegations that it chilled First Amendment rights); *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970) (courts are without "jurisdiction" to review Navy decision relieving officer from command of a destroyer escort ship assigned to duty in waters off Vietnam); *Jamison v. Stetson*, 471 F. Supp. 48 (N.D.N.Y. 1978) (denying injunctive relief to Air Force captain seeking to restrain his transfer to air base in Maine).

<sup>192</sup>*E.g.*, *Gilligan v. Morgan*, 413 U.S. 1 (1974); *McAbee v. Martinez*, 291 F. Supp. 77 (D. Md.), *application for injunctive relief denied*, 393 U.S. 904 (1968) (holding non-reviewable the military's decision to send a soldier to Vietnam over a protest that he had been inadequately trained for combat).

<sup>193</sup>*E.g.*, *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967) (*per curiam*) (refusing to review soldier's contention that American military action in Vietnam was unconstitutional and illegal). *Cf. Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983) (holding nonjusticiable alleged United States involvement in Nicaragua).

<sup>194</sup>*See, e.g., supra* notes 150, 152-54, cases cited therein and accompanying text.

<sup>195</sup>It might well be contended that the proposed initial inquiry for determining the proper scope of review is a balancing test, weighing the nature of the claim asserted against the nature and breadth of the military's discretion. If so, the scales in each case do not start from a position of equilibrium; where the claim is of jurisdictional, constitutional, statutory, or regulatory violation, the fulcrum of the scale is positioned closer to the military end, thus rendering more difficult a military claim for deferential treatment, but where the claim is that the military, although acting within its authority, has abused its discretion, the fulcrum is displaced toward the claimant's end of the scale, thus making it relatively more difficult for the claimant to obtain anything but the most severely restricted kind of judicial review.

At the outset of the article, nine examples of discretionary decisions were posited.<sup>196</sup> Analysis of those examples in light of the foregoing will serve to illustrate the methodology proposed, a methodology that is hoped to be as consistent with the modern presumption of reviewability of administrative action as it is with the traditional reluctance of the courts to interfere with military decisionmaking.

In all nine examples, reviewability, in the jurisdictional sense of raw judicial power to review, must be presumed today.<sup>197</sup> As in most cases, the appropriate scope of review is the true issue. The scope of review may and should vary both with the nature of the claim asserted and with the nature and breadth of legitimate military discretion.

For all nine examples, therefore, the type of claim raised would be a first consideration. If the challenge were that the military in making the decision acted beyond its lawful jurisdiction or violated the Constitution or a statute, the reviewing court usually would engage in a substantially independent review to satisfy itself that the alleged violation did or did not occur. In traditional parlance, the issue so posed would be essentially a "question of law," and there clearly would be "law to apply." Likewise, an alleged violation of military regulation usually would be subject to plenary judicial review, with one caveat; there is support for the proposition that courts ought not to review such cases unless the challenged regulation was promulgated for the benefit of the plaintiff, rather than for the efficient operation of the military.<sup>198</sup>

As to jurisdictional, constitutional, statutory, and regulatory challenges, a reviewing court should only rarely be willing to restrict or entirely withhold judicial review. The classic exceptional case is *Curran v. Laird*.<sup>199</sup> Such cases are rare, however, and none of the

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<sup>196</sup>See text accompanying notes 10-18 *supra*.

<sup>197</sup>Jurisdiction over an action brought by an aggrieved person in all nine examples could be founded on 28 U.S.C. § 1331 (1982), the general federal question jurisdiction. For purposes of this discussion, it is assumed that standing, ripeness, and exhaustion requirements have been satisfied and that the plaintiff in each case has been able to show that he was prejudiced in some legally cognizable way by the challenged decision.

<sup>198</sup>See *supra* notes 102 and 142.

<sup>199</sup>420 F.2d 122 (D.C. Cir. 1969); see *supra* notes 93-94, 116-19 and accompanying text.



nine examples appears to be such a case.<sup>200</sup> However, depending upon, for example, the regulatory breach alleged and upon the military considerations obtaining in each case, the scope of review might be restricted more than would be the case when the ordinary civilian agency is accused of a regulatory violation.<sup>201</sup>

A significantly different situation is posed in the examples, however, if we assume that the decision is challenged for arbitrariness or abuse of discretion. Such a question goes to the substantive correctness of the decision made. Where the effectiveness of the military *qua* military is implicated, such a challenge is presumptively "non-reviewable" or, at least, is subject to only the most restrictive of judicial reviews.<sup>202</sup>

Because the effectiveness of the military *qua* military is implicated in the decision in each of the first seven examples, Examples 1 through 7 should not be subjected to judicial review for abuse of discretion.<sup>203</sup> In each, either the decision made is closely related to military discipline and readiness, or judicial review of the merits would unacceptably impinge on discipline and readiness.

In Example 1, the decision to grant or deny a leave request may rest on a number of factors, not the least of which is readiness. Minimum manning requirements directly affect present combat

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<sup>200</sup>Given additional facts, some of the examples arguably might become exceptional cases. Both Examples 5 and 7 might be presented in such a way as to present a confluence of policy judgments affecting foreign relations and military order and discipline. In the actual cases, Example 5 was reviewed, *inter alia*, for statutory, environmental, violations, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), while Example 7 was reviewed for constitutional violations, albeit under constitutional standards lower than those used in the civilian community. See *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

<sup>201</sup>*E.g.*, *United States ex. rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969). See *supra* notes 123-26 and accompanying text.

<sup>202</sup>It is important to note that, in a challenge for arbitrariness or abuse of discretion, it is the *correctness* of the decision that is being challenged. Either no jurisdictional, constitutional, statutory, or regulatory violations were alleged or such allegations were found wanting. The arbitrariness or abuse of discretion claim necessarily is a more intrusive inquiry because it requires a reviewing court to attempt to place itself in the shoes of the decisionmaker and determine whether his exercise of discretion was correct, or, more precisely, correct enough to be labelled rational, not arbitrary, or not capricious.

<sup>203</sup>In those jurisdictions in which commitment to agency discretion generally does not prevent review for abuse of discretion, the court might conceivably engage in a limited review. Where judicial review is likely to impact adversely on military discipline or readiness, however, even courts in such jurisdictions sometimes have been willing to withhold any review of the merits of a discretionary decision. See *supra* note 158 and accompanying text.

readiness and the training planned for the requested leave period implicates future combat readiness. In the case of an officer, the effect upon readiness may be greatly multiplied, both because of the benefit the officer receives from undergoing the training and because the officer may be needed to conduct or to supervise the training others receive.

Perhaps more importantly, there is a chain of command within the military for "appealing" the denial of such a request. Utilizing that chain of command, even if it results in overturning the company commander's decision, reinforces the military's unique "hierarchical structure of discipline and obedience to command."<sup>204</sup> Allowing an appeal to the civilian courts after unsuccessful exhaustion of military remedies, for a reevaluation of the merits of that decision substantially undercuts military discipline. In the particular case, the complainant has denied finality to the discretionary decision of his military superiors even though no violation of the Constitution, a statute, or a regulation could be shown. As a matter of precedent for future cases, he has made both the service member requesting leave and the military decisionmaker aware that the *correctness*, rather than the legality, of a denial will be subject to civilian judicial review. Such civilian "tamper[ing] with the established relationship between military personnel and their superior officers"<sup>205</sup> is precisely what the Supreme Court has consistently eschewed.<sup>206</sup>

Examples 2 and 3 are instances of prosecutorial discretion. Beyond insuring compliance with constitutional requirements<sup>207</sup> or statutory or regulatory guidelines, courts would not review such decisions of civilian prosecutors.<sup>208</sup> Similarly, discretionary military decisions to bring or to withhold criminal prosecution should not be reviewed for abuse. Moreover, there exists a nexus between the military justice system and military discipline. Thus, arguments used in Example 1 may also be used to support judicial reluctance to intervene in this case.

Example 4 is among the most litigated of all discretionary military decisions. Successful challenges generally have been based on statutory or regulatory violations, such as defects in personnel records or

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<sup>204</sup>Chappell v. Wallace, 103 S.Ct. 2362, 2365 (1983). See *supra* note 181 and accompanying text.

<sup>205</sup>103 S.Ct. at 2365.

<sup>206</sup>However, because the APA would apply to the military in this situation, the platoon leader would presumably be entitled to a "brief statement of the grounds for denial" under section 555(e) of the APA. 5 U.S.C. § 555 (e) (1982).

<sup>207</sup>E.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886).

<sup>208</sup>See, e.g., *supra* note 12.

in promotion board proceedings.<sup>200</sup> It does not follow that a challenge that the promotion board's decision simply was so *incorrect* as to be an abuse of discretion should be reviewed by civilian courts. As with other specialized agencies, internal promotion decisions necessarily involve a degree of expertise and fine judgment which the judge cannot hope to duplicate. Moreover, the discretionary promotion decision impacts upon military readiness in at least two ways. "Promotion in the military necessarily leads to greater responsibility and control over the lives of service members. At the highest levels of command, an erroneous promotion decision could endanger the very security of the country."<sup>210</sup> This link between national security and military promotion and retention decisions was recognized by the Supreme Court as early as 1911 in *Reaves v. Ainsworth*.<sup>211</sup> Additionally, although individual instances of unwarranted judicial interference with promotions of lower and middle level officer personnel might not have an immediately perceivable effect on the nation's military readiness, the likely effects on the promotion system itself must be considered. Not only are nonselected officers likely to file "a flood of unmeritorious applications,"<sup>212</sup> thereby delaying their own discharge and delaying the promotion of other, more deserving officers, but promotion boards and officers charged with writing evaluation reports are likely to feel the effects. If forthright evaluations cease to be provided by rating officers, or if close judgments are avoided by promotion boards, the promotion system and ultimately the nation's military readiness will suffer.<sup>213</sup>

Training decisions such as that in Example 5 deserve judicial deference both because of their impact on military readiness and because of the degree of professional expertise required to make them. The Supreme Court reaffirmed the relationship between training and combat readiness as recently as last term, recognizing that courts are ill-suited for second-guessing this kind of military decision.<sup>214</sup> Second only to decisions in actual combat, decisions as to

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<sup>200</sup>*Ellis, supra* note 67.

<sup>210</sup>*Id.* at 136.

<sup>211</sup>219 U.S. 296 (1911). See text accompanying note 170 *supra*.

<sup>212</sup>*United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969).

<sup>213</sup>*Accord Ellis, supra* note 67, at 157 ("Surely, isolated instances of judicial intrusion may have no impact on the services' ability to perform their vital mission. But wholesale subjection of officers' claims to probing and independent review must in the long run impair the military's evaluation of its own personnel. We can only speculate as to how many commanders may have refrained from rendering complete and candid evaluations of their subordinates for fear that they would find themselves defendants in a lawsuit").

<sup>214</sup>See *supra* note 181 and accompanying text.

the best means of training for combat are precisely the type of determinations senior military officers are uniquely qualified to make.

Example 6 concerns the military award system. If military justice is the "stick," then military awards and incentives are the "carrot" in instilling military discipline. Accordingly, the arguments advanced in discussing Examples 1, 2, and 3 are equally applicable here. Moreover, the initial decision to recommend a service member for an award is entirely discretionary. Similarly, provided that no regulations were violated in the waiver denial, it is hard to conceive that D has suffered a legally cognizable injury in the denial of an award to which he was not initially entitled.

Example 7 is perhaps the strongest case for judicial refusal to examine the merits of the decision made. Widespread drug abuse obviously impairs combat readiness in a direct and serious way; provided that no constitutional, statutory, or regulatory mandate was transgressed, it is hard to contrive a reason for judicial examination of any step taken by a commander to combat this problem.

Examples 8 and 9 are both situations in which the fact that the military is the agency involved should not necessarily affect the scope of judicial review. In neither case is there a particularly close nexus between the decision and military readiness, nor is judicial review of the decision likely to impact significantly upon military readiness. In each case, the complainant probably would be a civilian, no interference with the relationship between military superior and subordinate is likely, and combat readiness could be affected at most in a very indirect way.<sup>215</sup> This is not to say that such decisions would invariably be reviewable for arbitrariness or abuse of discretion. Rather, no special deference is owed simply because the military is involved. Under the standards applicable to agencies generally, the decisions still might be held to be committed to agency discretion and, therefore, accorded only very limited or no review for abuse of discretion.

In the final analysis, discretionary military decisions deserve greater judicial deference than discretionary civilian decisions only when the decision is uniquely military. When the military members make decisions which bear little or no relation to military readiness,

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<sup>215</sup>Factual variations of each could, however, affect military readiness more directly. If Example 8 involved civilian cryptographers at a high level security installation, for example, national security and military readiness might be implicated. If Example 9 involved an establishment that sells drug paraphernalia rather than used cars, the connection to military readiness could be more readily discerned.

the decision should be treated as one of an administrative agency, subject to the same accountability in civilian courts as other arms of the federal government. When, however, the decision relates to the military's mission as the nation's fighting force, military discretion is at its broadest and most legitimate. As to such decisions, judicial deference is both appropriate and essential.

## II. CONCLUSION

Today, the presumption of reviewability applies to discretionary military administrative decisions. In the vast majority of military cases, there is little doubt of the *power* of the federal court to review military discretion. The major question in each case concerns the appropriate scope of review.

Although the facts of the particular case will affect the precise scope of review employed, courts should look first to the particular claim raised and to the nature and breadth of discretion involved as starting points for analysis. The fact that "the military" is involved in a case, standing alone, does not justify a court's refusal to review; conversely, the fact that, for example, a constitutional claim is raised does not, of itself, justify an independent judicial review in military cases. *Both* the particular claim raised and the discretion possessed impact on the appropriate scope of review. Keeping that principle in mind, it is possible to generalize to some degree based on the nature of the claim asserted.

Accordingly, challenges that the military acted beyond its authority, violated a statute, the Constitution, or its own regulation will usually be broadly reviewed by the courts. Despite the Supreme Court's "no law to apply" rule, however, there is support for the proposition that such a case may sometimes be held to be "committed to agency discretion" and therefore accorded a very limited review or no review at all.

In cases where the challenge is that the military has abused its otherwise legitimate discretion, the general presumption of reviewability of administrative decisions is opposed by a presumption of nonreviewability of military decisions. As to such challenges, in the absence of discernible congressional intent to the contrary, a severely limited scope of judicial review, or no review at all, is justified where the decision is closely related to the unique mission of the military *qua* military; where judicial review itself will be likely to impact adversely on that mission; or as with other agencies, where

other factors such as agency expertise in the particular subject under review justify judicial deference.

In all cases where the plaintiff seeks review of the exercise of military discretion, a reasoned approach not only to the availability but to the scope of judicial review is essential. In many military cases, judicial restraint will be advisable because the potential consequences of inappropriate judicial intrusion are so severe. As Judge Levanthal has wisely observed: "Not all operations of government are subject to judicial review, even though they may have a profound effect on our lives."<sup>216</sup>

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<sup>216</sup>Curran v. Laird, 420 F.2d 122, 133 (D.C. Cir. 1969). Cf. Warren, *supra* note 161, at 183 ("[W]hile the judiciary plays an important role in this area [of cases involving asserted military infringement of protected freedoms], it is subject to certain significant limitations, with the result that other organs of government and the people themselves must bear a most heavy responsibility").



## THE ADMINISTRATIVE PROCEDURE ACT AND THE MILITARY DEPARTMENTS

by Major Thomas R. Folk\*

### I. INTRODUCTION

To what extent does the Administrative Procedure Act (APA)<sup>1</sup> apply to the military departments? What impact does the APA have on military department regulations, adjudications, and other administrative actions, and on judicial review of these activities? The answers to these questions are not simple because of the many different provisions of the APA and their varying applicability to assorted military activities. This article briefly outlines the applicability of the various provisions of the APA to administrative actions by the military departments. The article first provides an overview of the APA and then discusses the general applicability of the APA to the military departments. Next, it discusses exemptions from the APA that are particularly applicable to military department activities. Finally, it discusses the specific provisions of the APA applicable to military department activities and the potential impact these provisions might have on military operations.

### II. OVERVIEW OF THE APA

In the 1930s and 1940s, the size and functions of federal administrative agencies expanded greatly.<sup>2</sup> This led to a growing concern about controlling the discretion of these agencies and insuring the

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\*Judge Advocate General's Corps, United States Army. Currently assigned to the Litigation Division, Office of The Judge Advocate General, U.S. Army, 1983 to present. Formerly Assistant to the General Counsel of the Army, 1980-83; Trial Counsel, Officer-in-Charge, Office of the Staff Judge Advocate, 3d Armored Division, Giessen Branch Office, 1978-80; Infantry Platoon Leader, 4th Battalion, 6th Infantry, Berlin Brigade, 1973-75. Distinguished Graduate, 31st Judge Advocate Officer Graduate Course, 1983; Distinguished Graduate, 87th Judge Advocate Officer Basic Course, 1978. Completed Infantry Officer Basic Course, 1972. J.D., University of Virginia, 1978; B.S., United States Military Academy, 1972. Author of *Tolling of Statutes of Limitations Under Section 205 of the Soldiers' and Sailors' Civil Relief Act*, 102 Mil. L. Rev. 157 (1983); *Military Appearance Requirements and the Free Exercise of Religion*, 98 Mil. L. Rev. 53 (1982); *Use of Compelled Testimony in Military Administrative Proceedings*, *The Army Lawyer*, Aug. 1982, at 1; *Service of Process on Government Officials Made Easy: Recent Changes to the Federal Rules of Civil Procedure*, *The Army Lawyer*, May 1983, at 23. Member of the bar of the Commonwealth of Virginia.

<sup>1</sup>Act of June 11, 1946, ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§551-559, 701-706 (1982)).

<sup>2</sup>See, e.g., K. Davis, 1 *Administrative Law Treatise* § 1.02 (1st ed. 1958).

uniformity, impartiality, and fairness of their procedures.<sup>3</sup> As a result of this concern, in 1946, Congress enacted the Administrative Procedure Act.

The APA provides a set of basic procedures for use by federal administrative agencies in carrying out their functions. As its name implies, the Administrative Procedure Act's provisions are purely procedural. It does not provide any substantive rights<sup>4</sup> nor even a jurisdictional basis for seeking judicial review of agency actions.<sup>5</sup>

The various provisions of the APA are now codified at 5 U.S.C. §§551 to 559 and 701 to 706. Basically, they cover the following major areas of agency administrative practice: (1) public information practices, such as publication in the Federal Register of agency organization and rules;<sup>6</sup> (2) public participation in rulemaking through informal rulemaking procedures;<sup>7</sup> (3) formal rulemaking and formal adjudication procedures;<sup>8</sup> (4) basic requirements for other miscellaneous agency administrative actions;<sup>9</sup> and (5) judicial review of agency action.<sup>10</sup>

### III. APPLICABILITY OF THE APA TO THE MILITARY DEPARTMENTS

The APA does not exclude the military departments *per se* from its coverage. The APA applies to each "agency," which is defined as "each authority of the Government of the United States."<sup>11</sup> Although sections 551 and 701 exclude certain military activities from their definition of "agency," and thus from almost all APA coverage, they deliberately do not exclude the military departments as organizations. The APA's legislative history explains: "[I]t has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. *Thus certain war and defense functions are exempted but not the War or Navy*

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<sup>3</sup>See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 (1950).

<sup>4</sup>*Hill v. United States*, 571 F.2d 1098 (9th Cir. 1978).

<sup>5</sup>*Califano v. Sanders*, 430 U.S. 99 (1977).

<sup>6</sup>5 U.S.C. § 552 (1982).

<sup>7</sup>*Id.* § 553.

<sup>8</sup>*Id.* §§553(c), 554, 556-557.

<sup>9</sup>*Id.* § 555.

<sup>10</sup>*Id.* §§701-706.

<sup>11</sup>*Id.* §§ 551(1), 701(b)(1) (1982). Courts have found this broad definition of agency to include nonappropriated fund instrumentalities such as post exchanges. See *Young v. United States*, 498 F.2d 1121 (5th Cir. 1974).

*Departments in the performance of their functions.*"<sup>12</sup> Courts considering the question have found the APA applicable to the military departments except to the extent the APA specifically exempts certain of their functions.<sup>13</sup>

#### IV. APA EXEMPTIONS PARTICULARLY APPLICABLE TO THE MILITARY

While not excluding the military departments generally, the APA does not apply, except for purposes of the public information requirements in 5 U.S.C. §552, to "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war or in occupied territory."<sup>14</sup> In addition, the informal rulemaking<sup>15</sup> and formal rulemaking and adjudication sections<sup>16</sup> of the APA exempt certain activities, including those involving a "military function," from their coverage. This part of the article will discuss these exemptions from the APA.

##### A. EXEMPTION OF COURTS-MARTIAL AND MILITARY COMMISSIONS

Neither the APA nor its legislative history defines the terms "courts martial [sic]" or "military commissions." However, under common usage, these terms have a well understood and limited meaning. A court-martial is a court of military or naval personnel for the trial of offenses against military law or the law of war,<sup>17</sup> the formalities prescribed for convening courts-martial by the Uniform Code of Military Justice,<sup>18</sup> the Manual for Courts-Martial,<sup>19</sup> and regulations<sup>20</sup> make it virtually impossible to confuse a court-martial

<sup>12</sup>Senate Committee on the Judiciary, Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191 (1947) (emphasis added) [hereinafter cited as *Apa Legislative History*]. See also *id.* at 138.

<sup>13</sup>*Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980); *Nicholson v. Brown*, 599 F.2d 639, 648 (5th Cir. 1979) *Jaffe v. United States*, 592 F.2d 712, 719-20 (3d Cir. 1979); *Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 n.2 (2d Cir. 1968); *Story v. Marsh*, 574 F. Supp. 505, 512 (E.D. Mo. 1983).

<sup>14</sup>5 U.S.C. §§ 551(1)(F), (G) (1982).

<sup>15</sup>*Id.* § 553.

<sup>16</sup>*Id.* §§ 553(c), 554, 556-557.

<sup>17</sup>Webster's New World Dictionary 339 (1964).

<sup>18</sup>10 U.S.C. §§ 801-938 (1982) [hereinafter cited as UCMJ].

<sup>19</sup>Manual for Courts-Martial, United States, 1984.

<sup>20</sup>*E.g.* U.S. Dep't of Army, Reg. No. 27-10, Legal Services - Military Justice, chs. 5, 12 (1 July 1984).

with another type of military tribunal. Military commissions are far less common in military practice but still have a narrow function similar to that of a court-martial. These tribunals are courts

convened by military authority for the trial of persons not usually subject to military law who are charged with violations of the laws of war; and in places subject to military government or martial law, for the trial of such persons when charged with violations of proclamations, ordinances, and valid domestic civil and criminal law of the territory concerned.<sup>21</sup>

Historically, "the distinctive name of *military commission* has been adopted for the exclusionary war court, which functions for the court-martial proper in time of war."<sup>22</sup>

Courts have followed this narrow usage in determining whether various military tribunals or boards fall under the APA exemption for "courts martial [sic] or military commissions". In *Roeloffs v. Secretary of the Air Force*, the District of Columbia Circuit held that military discharge review boards established under 10 U.S.C. §1553 and boards for correction of military records established under 10 U.S.C. § 1552 did not fall under this exemption.<sup>23</sup> Similarly, in *Neal v. Secretary of the Navy*,<sup>24</sup> the Third Circuit found that a military administrative board acting on reenlistment requests was not a court-martial or military commission under the APA.

### **B. EXEMPTION OF MILITARY AUTHORITY EXERCISED IN THE FIELD IN TIME OF WAR OR IN OCCUPIED TERRITORY**

Neither the APA nor its legislative history offer any guidance regarding the meaning of the APA exemption for "military authority exercised in the field in time of war or in occupied territory." The exemption's language raises four possible interpretational issues. What is "military" authority under this exemption? What is "in the field"? What does "in time of war" mean? And, what is "occupied territory"?

<sup>21</sup>U.S. Dep't of Army, Reg. No. 310-25, Military Publications—Dictionary of United States Army Terms, p. 168 (15 Sept. 1975).

<sup>22</sup>*Roeloffs v. Secretary of the Air Force*, 628 F.2d 594, 599 n. 23 (D.C. Cir. 1980) (emphasis in opinion).

<sup>23</sup>628 F.2d 594, 599 (D.C. Cir. 1980).

<sup>24</sup>639 F.2d 1029 (3d Cir. 1981).

Very few reported cases deal with this exemption, and they do so briefly. For example, in *Kam Koon Wan v. E.E. Black, Ltd.*,<sup>25</sup> the court noted briefly, in dicta, that "the Army in Hawaii legally was not 'in the field' or 'in occupied territory' even though it acted in that manner" in a case involving martial law in Hawaii in World War II. *Jaffee v. United States*<sup>26</sup> considered briefly, without deciding, the question of whether nuclear tests conducted in Nevada during the Korean conflict involved military authority exercised "in the field in time of war."

These two cases offer no meaningful guidance as to what the exemption means. Thus, one must look to the common meaning and usage of the terms of the exemption and the policy considerations behind the exemption to resolve the four interpretational issues raised by it.

### 1. "Military Authority"

Multiple definitions and usage illustrate an interpretational issue regarding the term "military authority." Does the term mean "military" in the narrow sense of pertaining to soldiers and armies<sup>27</sup> or in the broader sense of pertaining to war and defense functions?<sup>28</sup> Congress' approach in the APA of focusing on functions rather than organizations<sup>29</sup> suggests that "military" authority refers to authority exercised in furtherance of defense and war functions, even if exercised by civilian personnel, rather than limiting it to authority exercised solely by uniformed military personnel.

### 2. "In the field"

The term "in the field" is closely analogous to language in Article 2(10), UCMJ,<sup>30</sup> which subjects persons to the UCMJ who accompany an armed force "in the field." Under Article 2, the words "in the field" imply military operations "with a view to an enemy."<sup>31</sup> Courts have recognized that the term denotes activity rather than specific geographic location. For example, in *Hines v. Mikell*,<sup>32</sup> the

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<sup>25</sup>75 F. Supp. 553 (D. Hawaii 1948).

<sup>26</sup>592 F.2d 712, 719-20 (3d Cir. 1979).

<sup>27</sup>See Webster's Third New International Dictionary 1432 (1961); Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 Mich. L. Rev. 249, 257 (1972).

<sup>28</sup>See Bonfield, *supra* note 27, at 257.

<sup>29</sup>See, e.g., APA Legislative History, *supra* note 12, at 191, 250, 303.

<sup>30</sup>10 U.S.C. § 802(10) (1982).

<sup>31</sup>14 Op. Att'y Gen. 22 (1872).

<sup>32</sup>259 F. 28, 34 (4th Cir. 1919).

court held that forces training in temporary camps in the United States preparatory to service in an actual theater of war were "in the field." Similarly, courts have found that a merchant ship and crew transporting troops and supplies to a battle zone were "in the field."<sup>33</sup> Presumably, the same kinds of emergency considerations that allow exercise of court-martial jurisdiction over persons "in the field," who normally are not subject to such jurisdiction, apply to exempting military authority from the APA's requirements when exercised "in the field."

### 3. "In time of war"

The chief potential interpretational issue regarding the term "in time of war" is whether it refers only to a war declared by Congress or whether it refers to other armed conflicts as well. One case construing the term "in time of war" in Article 2(10), UCMJ, supports a narrow interpretation.<sup>34</sup> Several cases construing the phrase "in time of war" in Article 43, UCMJ, however, as well as its common usage and usage in international law, suggest a much broader, functional interpretation.<sup>35</sup> This latter, functional interpretation is more consistent with Congress' approach in the APA of focusing on functional classifications.<sup>36</sup>

### 4. "Occupied Territory"

The term "occupied territory" derives its meaning from international law, particularly the law of war. Under the law of war, "occupied territory" is territory placed under the authority of a hostile army.<sup>37</sup> Occupied territory is distinguishable from a nation's own territory governed under martial law or from the territory of a friendly nation administered temporarily under a civil affairs agreement.<sup>38</sup> Whether territory is occupied is a question of fact.<sup>39</sup> United States

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<sup>33</sup>*In re Berve*, 54 F. Supp. 252 (S.C. Ohio 1944); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943). See also *Ex parte Gerlack*, 247 F.2d 616 (S.D.N.Y. 1917); Hearings on H.R. 2998 Before a Subcomm. of the Comm. on Armed Serv., House of Representatives, 81st Cong., 1st Sess., 872-73 (1949).

<sup>34</sup>See *United States v. Averette*, 19 C.M.A. 363, 41 C.M.R. 363 (1971).

<sup>35</sup>See, e.g., *United States v. Anderson*, 17 C.M.A. 588, 38 C.M.R. 386 (1968); *United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1977); *United States v. Reyes*, 48 C.M.R. 832 (A.C.M.R. 1974); I. Brownlie, *International Law and the Use of Force by States* 401 (1963).

<sup>36</sup>See, e.g., APA Legislative History, *supra* note 12, at 191, 250, 303.

<sup>37</sup>Annex to Hague Convention No. 4, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, 36 Stat. 2277, T.S. No. 539.

<sup>38</sup>U.S. Dep't of Army, Field Manual No. 27-10, *The Law of Land Warfare* p. 139 (July 1956).

<sup>39</sup>*Id.*



practice is to issue an occupation proclamation, although international law does not require this measure.<sup>40</sup> Currently, the only territory occupied by the United States is West Berlin.<sup>41</sup>

### C. MILITARY FUNCTIONS EXEMPTION

Both 5 U.S.C. §553, which relates to agency rulemaking, and 5 U.S.C. §554, which relates to formal, "on the record," agency adjudications, exempt "military functions" from their coverage.<sup>42</sup> The APA does not define the term "military function." One commentator has complained that the term is "unduly vague, hard to define, and harder yet to apply."<sup>43</sup> It is clear, however, that the term "military function" is not coextensive with all the activities of the military departments. Congress' failure to totally exempt the War and Navy Departments from the APA and the APA's legislative history indicate that Congress' did not intend the term "military function" to include all activities of the military departments.<sup>44</sup> In particular, testimony before Congress distinguished between most of the War Department's activities, considered to be military functions, and activities by the Army Corps of Engineers involving navigable waters, which were considered civil functions.<sup>45</sup>

Courts have broadly construed the term "military function" to include a wide range of military department activities outside the Corps of Engineers civil works areas. These activities include excluding persons from a submarine launching area,<sup>46</sup> determining whether military persons missing in action were deceased,<sup>47</sup> declaring merchant seamen to be security risks<sup>48</sup> or finding their presence on certain American merchant vessels inimical to the national

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<sup>40</sup>*Id.* at 140.

<sup>41</sup>For a discussion of Berlin's present legal status as an occupied city, see Hillenbrand, *The Legal Background of the Berlin Situation* in F. Hillenbrand, *The Future of Berlin* (1980).

<sup>42</sup>5 U.S.C. §§ 553(a)(1), 554(a)(4) (1982). The exemptions refer to "a military or foreign affairs function."

<sup>43</sup>Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 Mich. L. Rev. 222 (1972).

<sup>44</sup>See APA Legislative History, *supra* note 12 and accompanying text.

<sup>45</sup>Hearings Before a Subcomm. of the Comm. on the Judiciary, United States Senate, on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess. 35-51 (1941).

<sup>46</sup>*United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962).

<sup>47</sup>*McDonald v. Lucas*, 371 F. Supp. 837 (S.D.N.Y. 1973), *application for stay of judgment and other relief denied*, 417 U.S. 905 (1974).

<sup>48</sup>*Parker v. Lester*, 112 F. Supp. 433 (N.D. Cal. 1953), *rev'd on other grounds*, 227 F.2d 709 (9th Cir. 1955).

security,<sup>49</sup> determining whether doctors should be authorized delay in entering on active duty based on community hardship,<sup>50</sup> and reviewing military discharges.<sup>51</sup> These decisions neither analyze the meaning of "military function" in great detail nor give any definition of the term.

The only in-depth analysis of the "military function" exemption appears in a single law review article by Professor Arthur Bonfield.<sup>52</sup> Professor Bonfield argues that, based on the "plain meaning" of the words "military" and "function" and on the APA's legislative history, the exemption applies to the extent that there are "clearly and directly involved matters specifically fitted for, appropriate to, or expected of the armed forces in light of their peculiar nature and qualifications."<sup>53</sup> This narrow definition is in contrast to the broader possible definition which would equate "military function" with "national defense function" or "war function."<sup>54</sup>

The latter, broader interpretation finds stronger support in court decisions, legislative history, longstanding administrative interpretation, and congressional acquiescence. Several court decisions have implicitly given the term "military function" its broadest possible definition.<sup>55</sup> The APA's legislative history refers to wartime functions of a civilian agency as a military function.<sup>56</sup> Similarly, the *Attorney General's Manual on the Administrative Procedure Act*,<sup>57</sup> published shortly after the APA's enactment and regarded as an authoritative administrative interpretation of the APA,<sup>58</sup> uses this same illustration.<sup>59</sup> Further, the Department of Defense has repeat-

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<sup>49</sup>*McBride v. Roland*, 248 F. Supp. 459 (S.D.N.Y. 1965), *aff'd* 369 F.2d 65 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 411 (1968).

<sup>50</sup>*Nicholson v. Brown*, 599 F.2d 639, 648 n.9 (5th Cir. 1979); *Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976).

<sup>51</sup>*Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980).

<sup>52</sup>Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 Mich. L. Rev. 222 (1972).

<sup>53</sup>*Id.* at 257.

<sup>54</sup>*Id.* at 249.

<sup>55</sup>*See, e.g., Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980); *United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962).

<sup>56</sup>APA Legislative History, *supra* note at 225. *See also id.* at 267 (substituting word "war" for "military" function), 355 (describing civilian defense authorities as "pure military" functions).

<sup>57</sup>U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) [hereinafter cited as *Attorney General's Manual*].

<sup>58</sup>*See, e.g., G. Edles & J. Nelson, Federal Regulatory Process: Agency Practices and Procedures* 9 (1982).

<sup>59</sup>*Attorney General's Manual, supra* note 57, at 26.

edly asserted to Congress that almost all its activities fall under the "military function" exemption.<sup>60</sup> Courts normally defer to such longstanding interpretations.<sup>61</sup>

Regardless of whether the "military function" exemption is given the narrower interpretation urged by Professor Bonfield or the broader interpretation given by courts and administrative agencies, it clearly applies to many military department regulations and adjudications. In any event, its exact scope may be largely academic because the other major exemptions to informal rulemaking under section 553 cover most military regulations. Similarly, the formal rulemaking and adjudication procedures in sections 556 and 557 only apply to rulemaking or adjudications "required by statute to be made on the record after opportunity for an agency hearings,"<sup>62</sup> which is not the case with most, if not all, military department rulemaking and adjudication.<sup>63</sup>

## V. APPLICABILITY AND IMPACT OF SPECIFIC APA PROVISIONS ON MILITARY ACTIVITIES

As indicated previously, the APA does apply to the military departments generally but has two almost-blanket exceptions for "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war or in occupied territory." Further, two other APA provisions—the rulemaking requirements of 5 U.S.C. §553 and the formal adjudication requirements of 5 U.S.C. §554 specifically exempt "military functions" from their requirements. This section of the article examines the applicability and potential impact of each of the five major parts of the APA on military activities.

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<sup>60</sup>House Committee on Government Operations, Survey and Study of Administration, Organization, Procedure, and Practice in the Federal Agencies, 85th Cong., 1st Sess., pt.3 (1957); Bonfield, *supra* note 52, at 252-53.

<sup>61</sup>Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

<sup>62</sup>5 U.S.C. §§ 553(c), 554(a) (1982). The Supreme Court, in *Wong Yung Sung v. McGrath*, 339 U.S. 33, 50 (1950), indicated that hearings compelled by reason of due process are treated as "required by statute" for purposes of sections 554, and 556-57. However, the modern judicial trend has been to match specific hearing elements to the circumstances rather than apply all elements of these sections to constitutionally required hearings. See, e.g., G. Edles & J. Nelson, *Federal Regulatory Process: Agency Practices and Procedures* § 5.2 (1982).

<sup>63</sup>See APA Legislative History, *supra* note 12, at 202.

## A. INFORMATION PRACTICES AND REGULATIONS

Unlike other APA provisions, the information practices provision of the APA contained in 5 U.S.C. §552 apply to the military departments without any exception for courts-martial or military commissions or for military authority exercised in the field in time of war or in occupied territory. Section 552 prescribes three ways agencies must make information available to the general public: (1) through publication in the Federal Register;<sup>64</sup> (2) through making final opinions available to the public in reading rooms;<sup>65</sup> and (3) through release of other information on request.<sup>66</sup>

A complete treatment of the impact of section 552 on the military departments and military activities is beyond the scope of this article. The publication requirement is, however, of particular importance to military regulatory programs and the legal challenges to them because a person need not resort to, or be adversely affected by, a matter required to be, but not, published in the Federal Register, except to the extent the person has actual and timely notice of it.<sup>67</sup>

What regulations must be published in the Federal Register? Section 552(a)(1) requires publication "for the guidance of the general public" of, *inter alia*, "substantive rules of general applicability adopted as authorized by law."<sup>68</sup> The precise meaning of this requirement is unclear.<sup>69</sup> Courts have stated, however, that, in order for a rule to be one of "general applicability," it must have "a direct and significant impact upon the substantive rights of the general public or a segment thereof."<sup>70</sup> Many military regulations fall outside of this threshold requirement for publication because they arguably are not of "general applicability" and their publication is not needed for "the guidance of the public."<sup>71</sup> In addition, the nine exemptions in 5 U.S.C. §552(b), particularly exemption (b)(2) regarding matters "related solely to the internal personnel rules and practices of an agency," seem to provide an alternative justification for

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<sup>64</sup>5 U.S.C. § 552(a)(1) (1982).

<sup>65</sup>*Id.* § 552(a)(2).

<sup>66</sup>*Id.* § 552(a)(3).

<sup>67</sup>*Id.* § 552(a)(1).

<sup>68</sup>*Id.* § 552(a)(1)(D).

<sup>69</sup>K. Davis, 2 Administrative Law Treatise 341 (3d ed. 1979).

<sup>70</sup>National Ass'n of Veterans v. Secretary of Defense, 487 F. Supp. 192, 200 (D.C. Cir. 1979) (citing *Lewis v. Weinberger*, 415 F. Supp. 652, 659 (D.N.M. 1976)).

<sup>71</sup>*Id.*

not publishing many military regulations in the Federal Register.<sup>72</sup> Courts have rejected challenges to nonpublication of agency rules that, like most of the military departments', appear to be purely internal and not ones of "general applicability" needed "for the guidance of the public."<sup>73</sup>

Even if an agency fails to publish a regulation in the Federal Register when required by section 552, the regulation may still not be totally unenforceable. First, unpublished regulatory provisions will be binding on persons having actual and timely notice of them.<sup>74</sup> Second, the unpublished regulation will still be effective against persons to the extent its nonpublication did not "adversely affect" them.<sup>75</sup> Third, the remedy available to a person challenging an unpublished regulation is not necessarily nullification of the underlying regulation.<sup>76</sup>

## B. APA INFORMAL RULEMAKING PROCEDURES

Section 553 prescribes certain informal rulemaking procedures that agencies must follow in issuing substantive rules. The most notable of these provides the public an opportunity to comment on a proposed rule before the rule becomes effective.<sup>77</sup> The section totally exempts two classes of activities from its scope: "(1) a military or foreign affairs function of the United States; or (2) a matter relating

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<sup>72</sup>One might argue that the Supreme Court's decision in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976) makes the (b)(2) exemption so narrow that it provides little justification for not publishing a regulation. However, *Rose* construed the (b)(2) exemption as it relates to a Freedom of Information Act (FOIA) request under 5 U.S.C. § 552(a)(3). Arguably, the policies regarding publication under 5 U.S.C. § 552(a)(1) are different than those relating to release of information under FOIA. Further, in the case of publication under section 552(a)(1), the (b)(2) exemption must be read in conjunction with the (a)(1) requirements for publication, i.e., "for guidance of the general public" and "rules of general applicability".

<sup>73</sup>*See, e.g.*, *Pitts v. United States*, 599 F.2d 1103, 1108 (1st Cir. 1979); *Whelan v. Brinejar*, 538 F.2d 924, 927 (2d Cir. 1976); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 487 F. Supp. 192, 201 (D.D.C. 1979); *Pifer v. Laird*, 328 F. Supp. 649, 652 (N.D. Cal. 1971). *See also* *United States v. Tolkach*, 14 M.J. 239, 241 (C.M.A. 1982) (Federal Register publication not required for military service regulations relating solely to military personnel practices).

<sup>74</sup>*See, e.g.*, *United States v. Mowatt*, 582 F.2d 1194 (9th Cir. 1978); *United States v. Floyd*, 477 F.2d 1194 (10th Cir. 1973). *But see* *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977).

<sup>75</sup>*See, e.g.*, *Neighborhood & Legal Services v. Legal Services Corp.*, 446 F. Supp. 1148 (D. Conn. 1979).

<sup>76</sup>*Id.*

<sup>77</sup>5 U.S.C. §§ 553(c),(d) (1982).

to agency management, personnel or to public property, loans, grants, benefits or contracts."<sup>78</sup>

The "military function" exemption was discussed in section III.C above. Most military regulations, except for those dealing with the Army Corps of Engineers Civil Works mission, arguably fall under this exemption.<sup>79</sup> In addition, the section 553 exemption for, among other things, matters relating to agency management, personnel, public property, benefits, or contracts<sup>80</sup> provides an independent basis for exempting almost all military regulations from section 553.

### C. APA FORMAL RULEMAKING AND ADJUDICATION

Sections 556 and 557 prescribe procedures to be applied to certain agency rulemaking and adjudications. These procedures apply when rules or adjudications are "required by statute to be made on the record after opportunity for an agency hearing."<sup>81</sup>

The formal rulemaking or adjudication procedures of sections 556 and 557 will rarely, if ever, apply to military department proceedings for two reasons. First, section 554 has the same "military function" exemption as section 553.<sup>82</sup> Second, there apparently are no statutes applicable to the Department of Defense or the military departments that require rulemaking or adjudications "on the record after opportunity for an agency hearing."<sup>83</sup>

The courts have held that either the words "on the record" must appear in a statute or Congress must clearly indicate its intent to trigger the formal, on the record, hearing provisions of the APA for sec-

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<sup>78</sup>*Id.* §§ 553(a)(1), (2).

<sup>79</sup>Agency regulations implementing 5 U.S.C. § 553 may themselves narrow the military functions exemption. For examples, 32 C.F.R. § 519.64(b)(2) (1983) narrows the exemption for Department of the Army rules to matters "which have been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy."

<sup>80</sup>For a general discussion of this exemption see Annot., 41 A.L.R. Fed. 926 (1979).

<sup>81</sup>5 U.S.C. §§ 553(c), 554(a), (c) (1982).

<sup>82</sup>The APA's legislative history indicates the two exemptions were to mirror each other. See APA Legislative History, *supra* note 12, at 202, 261. See also Attorney General's Manual, *supra* note 57, at 45.

<sup>83</sup>The APA's legislative history also notes that statutes rarely, if ever, require military functions to be exercised upon hearing. APA Legislative History, *supra* note 12, at 202, 261.



tions 556 and 557 to apply.<sup>84</sup> The fact that a statute requires a hearing does not, by itself, necessarily trigger the procedures in these sections.<sup>85</sup> An early Supreme Court decision, *Wong Yung Sung v. McGrath*, indicated that the provisions of sections 556 and 557 apply absent this exact language when due process requires a hearing with a determination on the record.<sup>86</sup> The exact reach of *Wong Yung Sung* is unclear, particularly when due process requires some elements of a hearing with a determination on the record and not other elements.<sup>87</sup> However, the modern judicial trend is to not apply these sections' procedures simply because due process requires some aspects of a hearing on the record;<sup>88</sup> more recent Supreme Court opinions, such as *Matthews v. Eldridge*,<sup>89</sup> emphasize the need to tailor hearing elements to the particular circumstances. This modern trend is more consistent with the APA's legislative history than strict application of the provisions of sections 556 and 557 in all instances when due process requires some kind of hearing.<sup>90</sup>

#### **D. MISCELLANEOUS AGENCY ACTIONS AND SECTION 555**

Section 555 of the APA may have the greatest impact on military department activities. In particular, the provisions giving a right to counsel, personal appearance, and notice of reasons for denial of a petition in an agency proceeding<sup>91</sup> could potentially affect military department administrative practice in a significant way.

Three courts have stated that section 555 applies to the military departments.<sup>92</sup> In the leading case, *Roeloffs v. Secretary of the Air*

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<sup>84</sup>See, e.g., *West Chicago v. Nuclear Regulatory Comm'n*, 701 F.2d 632, 641 (7th Cir. 1983); *United States Lines v. FMC*, 584 F.2d 519, 536 (D.C. Cir. 1978). See also *Camp v. Pitts*, 411 U.S. 138 (1973); *United States v. Florida East Coast Ry.*, 410 U.S. 224, 234-38 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-58 (1972).

<sup>85</sup>*Id.*

<sup>86</sup>339 U.S. at 50.

<sup>87</sup>K. Davis, 2 *Administrative Law Treatise* 333-34 (2d ed. 1979).

<sup>88</sup>See, e.g., G. Edles & J. Nelson, *Federal Regulatory Process: Agency Practices and Procedures* § 5.2 (1982).

<sup>89</sup>424 U.S. 319 (1976).

<sup>90</sup>See APA Legislative History, *supra* note 12, at 21-22, 193, 202, 260, 268, 304, 315, 359.

<sup>91</sup>5 U.S.C. § 555(b)(e) (1982).

<sup>92</sup>*Roeloffs v. Secretary of the Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980); *Nicholson v. Brown*, 599 F.2d 639, 648 n.9 (5th Cir. 1979); *Wood v. Secretary of Defense*, 496 F. Supp. 199 (D.D.C. 1980).

*Force*,<sup>93</sup> the court held that section 555 applied to discharge review boards and boards for correction of military records. The court reasoned that section 551 did not exempt them from the APA *per se* since they were not "courts martial [sic] or military commissions," and section 555 applied "according to the provisions thereof, except as otherwise provided by" the APA.<sup>94</sup> Accordingly, the court required the Air Force Discharge Review Board and Board for Correction of Military Records to provide a statement of reasons under section 555(e) on why they denied a full discharge upgrade to an applicant.

*Roeloffs'* reasoning is logical, although one could argue that the same "military function" exemption that appears in sections 553 and 554 should apply to section 555. In fact, several courts have applied exemptions from section 554 to section 555.<sup>95</sup> However, this approach is wholly inconsistent with the APA's language,<sup>96</sup> its legislative history,<sup>97</sup> and basic canons of statutory construction.<sup>98</sup>

One might also argue that a military exception to section 555 should be implied because strict application of the section would be inconsistent with Congress' general approach toward military personnel decisions and would lead to absurd results. Although the Supreme Court has noted that such exceptions to the APA "are not lightly to be presumed,"<sup>99</sup> there is obvious merit to this argument, as well as support in current case law.<sup>100</sup>

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<sup>93</sup>628 F.2d 594 (D.C. Cir. 1980).

<sup>94</sup>*Id.* at 599.

<sup>95</sup>See *Cleveland Trust Co. v. United States*, 421 F.2d 475, 482 (6th Cir.), *cert. denied*, 400 U.S. 819 (1970); *Suess v. Pugh*, 245 F. Supp. 661, 665 (N.D. W.Va. 1965).

<sup>96</sup>Section 555 states that its provisions apply "according to the provisions thereof, except as otherwise provided by" the APA. The military function exceptions in sections 553 and 554 make no reference to section 555.

<sup>97</sup>See APA Legislative History, *supra* note 12, at 194, 202, 263-267, 362.

<sup>98</sup>It is a basic canon of statutory construction that *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). 2 J. Sutherland, *Statutory Construction* § 4915-17, at 412-23 (4th ed. 1972). Thus Congress' express mention of military functions as excluded from 5 U.S.C. §§ 553, 554, but not from 5 U.S.C. § 555, arguably indicates an intent not to exclude military functions from section 555.

<sup>99</sup>*Marcello v. Bonds*, 349 U.S. 302, 310 (1953).

<sup>100</sup>*Clardy v. Levi*, 545 F.2d 1241 (9th Cir. 1976), implied an exemption from the right-to-counsel requirements of the APA for prison disciplinary proceedings. Military interests in discipline and efficiency are much greater and support an implied exception for military activities. See also *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) (explaining implied exception to the Federal Tort Claims Act for injuries incurred incident to military service as based on concern with interference of tort suits on military discipline).

What potential impact would application of section 555 procedures have on military administrative practice? To answer this question requires examination of several of the section's particular provisions.

*1. Right to Counsel and to Personal Appearance Under Section 555(b)*

Section 555(b) provides in part:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

Section 555(b) thus provides two rights regarding counsel and one regarding personal appearance.

*a. Compelled appearances.*

The first sentence gives a person "compelled to appear in person" before an agency's representative a right to be "accompanied, represented, and advised by counsel." This right is not limited to any particular type of agency action and thus its potential scope in the military is very broad. Given the APA's definitions of "agency" and "person,"<sup>101</sup> it literally would seem to apply to any situation in which a military member is ordered to appear before any higher authority. This could be carried to ridiculous extremes. For example, under the sentence's literal language, a private would have the right to bring counsel each time he was ordered to appear before his squad leader or company commander. Even if not carried to this extreme, the right certainly would literally apply to persons ordered to appear in more formal military actions, including service members receiving nonjudicial punishment under summarized proceedings<sup>102</sup> and before investigations under Article 32, UCMJ<sup>103</sup> and administrative investigations.<sup>104</sup>

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<sup>101</sup>5 U.S.C. § 551(1), (2) (1982).

<sup>102</sup>See U.S. Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 3-16 (1 July 1984).

<sup>103</sup>10 U.S.C. § 832 (1982).

<sup>104</sup>U.S. Dep't of Army, Reg. No. 15-6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers, para. 3-3 (c1, 15 June 1981), appears to give a narrower right to participation by counsel in Army administrative proceedings than the right granted in 5 U.S.C. § 555(b) for agency proceedings generally.

There are, however, significant limiting principles to this right to counsel. First, the right does not require the government to provide counsel.<sup>105</sup> Second, the right only applies when a person is "compelled" to appear and not when a person may appear as of right but is not compelled to do so.<sup>106</sup> Third, the right may not apply to investigative, as opposed to adjudicatory, proceedings.<sup>107</sup> Finally, the activities of counsel may be limited, as appropriate, to the type of agency action.<sup>108</sup>

*b. Parties to Agency Proceedings*

The second sentence of section 555(b) gives a "party" a right to appear in person or by or with counsel in an "agency proceedings." Although this sentence does not limit the right to counsel to compelled appearances, it has two other explicit limitations not present in the first sentence; it applies to a "party" rather than to a "person" and it applies only to "agency proceedings." Also, despite its plain language, courts have recognized that the right is not absolute and depends on the nature of the proceeding.<sup>109</sup>

*i. Party*

The APA defines "party" to include "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding."<sup>110</sup> The common meaning of party includes "one (as a person or group) constituting alone or with others one of the two sides in a proceeding."<sup>111</sup> The APA's legislative history states that "[t]he word party in the second sentence is to be understood as meaning any person showing the requisite interest in the matter, since the section applies in connection with the exercise of any agency authority whether or not formal proceedings are available."<sup>112</sup> These definitions would appear to include applicants, respondents, or others who are the subject of various Army administrative boards or investigations as well as persons being offered punishment under Article 15, UCMJ.<sup>113</sup>

<sup>105</sup>See, e.g., *Grover v. United States*, 200 Ct. Cl. 337 (1973); *Nees v. SEC*, 414 F.2d 211 (9th Cir. 1969); *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied sub nom. Thompson v. United States Board of Parole*, 375 U.S. 957 (1963).

<sup>106</sup>See *Smith v. United States*, 250 F. Supp. 803 (D.N.J. 1966), *appeal dismissed*, 377 F.2d 739 (3d Cir. 1967); *Suess v. Pugh*, 245 F. Supp. 661 (N.D.W.Va. 1965).

<sup>107</sup>See *Annot.*, 33 A.L.R. 229, 255 (1970).

<sup>108</sup>See *FCC v. Schreiber*, 329 F.2d 517 (9th Cir. 1964).

<sup>109</sup>See, e.g., *DeVyver v. Warden*, 388 F. Supp. 1213 (M.D.Pa. 1974).

<sup>110</sup>5 U.S.C. § 551(3) (1982).

<sup>111</sup>*Webster's Third New International Dictionary of the English Language* 1648 (1961).

<sup>112</sup>APA Legislative History, *supra* note 12, at 263-64. See also *id.* at 13, 205.

<sup>113</sup>10 U.S.C. § 815 (1982).

*ii. Agency Proceeding*

The definition of an "agency proceeding" under the APA is a more complicated question. Section 551(12) defines "agency proceeding" as "rulemaking", "adjudication", or "licensing." These three terms obviously do not describe all agency activities.<sup>114</sup> Thus, unless an agency action falls under one of these three terms, it is not subject to section 555.

The military departments do not typically engage in rulemaking involving parties or in licensing.<sup>115</sup> However, many military department activities would appear to be considered "adjudication" under the literal language of the APA.<sup>116</sup> The APA defines adjudication as an "agency process for formulation of an order."<sup>117</sup> In turn, it defines "order" as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing."<sup>118</sup>

The potentially broad APA definitions of "party" and "agency proceeding" coupled with the right to counsel and personal appearance requirements of section 555(b) could have a significant effect on certain military actions. For example, under Department of Defense Directive 1332.14<sup>119</sup> and Army Regulation 635-200,<sup>120</sup> there is no express right to appear personally or with counsel in many administrative discharge proceedings. Instead, a "notification procedure" applies whereby the service member receives a written notice of proposed separation and may respond in writing.<sup>121</sup> If the service member insisted on appearing personally with counsel before the separation authority, must the separation authority permit this? A literal reading of section 555(b) would indicate so. Similarly, claims to a right to appear personally with counsel could be made regarding

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<sup>114</sup>See *I.T.&T. Corp. v. Local 134, I.B.E.W.*, 419 U.S. 428, 442 (1974).

<sup>115</sup>The APA defines licensing as "agency processing respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of a license." 5 U.S.C. § 551(8)(1982). Some military activities, such as allowing commercial activities on installations, would appear to fall under this definition.

<sup>116</sup>Courts have rejected the argument that the term adjudication is limited to the sense it is used in 5 U.S.C. § 554. See, e.g., *Mitchell v. Sigler*, 389 F. Supp. 1012, 1014-19 (N.D. Ga. 1975).

<sup>117</sup>5 U.S.C. § 551(7) (1982).

<sup>118</sup>5 U.S.C. § 551(6) (1982).

<sup>119</sup>Dep't of Defense Directive No. 1332.14, Enlisted Administrative Separations (28 Jan. 1982); 32 C.F.R. Pt. 41 (1983).

<sup>120</sup>Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Separations (1 Oct. 1982).

<sup>121</sup>See 32 C.F.R. § 41, App. A at 3B (1983).

complaints made under Article 138, UCMJ,<sup>122</sup> reports of survey, proceedings under Article 15, UCMJ,<sup>123</sup> applications to the correction boards, or consideration by promotion boards.

One might argue, however, that actions such as initial approval of an administrative separation are not "adjudications" because they are not "final dispositions."<sup>124</sup> Instead, one could argue that all military records are eventually subject to review by a board for correction of military records,<sup>125</sup> and that any action involving a military record is, therefore, not a "final disposition" until the board review has occurred. The problem with this argument is that the APA defines "adjudication" as the "agency process for the formulation of" the "whole or part of a final disposition."<sup>126</sup> The Supreme Court did recognize in *I.T.&T. v. Local 134, I.B.E.W.* that an intermediate decision would not be considered an adjudication under the APA when it bound no one, had no determinative consequences for the parties, and was separate and distinct from the actual final disposition of a matter.<sup>127</sup> However, as the Court later indicated in *NLRB v. Sears, Roebuck & Co.*,<sup>128</sup> the fact that an agency decision may be overturned on administrative appeal does not affect its finality. The Court in *Sears* instead focused on whether the administrative action at issue had "operative effect" without further administrative review.<sup>129</sup> Thus, the fact that military administrative action such as awarding an administrative discharge is subject to appeal to a board for correction of military records would not affect a party's right to personal appearance and counsel under section 555(b). The administrative action would still be an "agency proceeding" if it has operative effect on its own or has determinative consequences for the parties. As such, the APA right to counsel and personal appearance, if applicable to military proceedings, would then apply.

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<sup>122</sup>10 U.S.C. § 938 (1982).

<sup>123</sup>*Id.* § 815.

<sup>124</sup>The APA defines "adjudication" as "agency process for formulation of an order" and order as "the whole or part of a final disposition." 5 U.S.C. §§ 551 (6), (7) (1982).

<sup>125</sup>Under 10 U.S.C. § 1552 (1982), Boards for Correction of Military Records (BCMRs) have authority to correct a military record "to correct an error or remove an injustice." The BCMRs represent the final and ultimate military administrative remedy.

<sup>126</sup>5 U.S.C. 551(b), (7) (1982) (emphasis added).

<sup>127</sup>419 U.S. 428, 442 (1974).

<sup>128</sup>421 U.S. 132 (1975).

<sup>129</sup>*Id.* at 158-59 n.25.



### C. IMPLICIT EXCEPTION

Several courts have recognized that the right to personal appearance or counsel under section 555(b) is not absolute. Instead, they require consideration of the nature of the proceeding. This reasoning has particular force in the military context.

Perhaps the leading case to recognize an implicit exemption to section 555(b) is *Clardy v. Levi*.<sup>130</sup> In *Clardy*, the Ninth Circuit held that the provisions of the APA do not apply to prison disciplinary proceedings. The court recognized that, based on the literal language of the APA, the argument that section 555 applied to prison disciplinary proceedings was "technically impressive."<sup>131</sup> Yet, the court refused to apply the APA to prison disciplinary proceedings because its application would "unduly inhibit prison management."<sup>132</sup>

Similarly, the court in *DeVyver v. Warden*<sup>133</sup> held that 5 U.S.C. §§ 554, 555 did not apply to parole decisionmaking despite the literal language of the APA. Further, the court noted that, even if section 555(b) applied to parole decisionmaking, "the affirmative right to appear apparently bestowed by Section 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business."<sup>134</sup>

The only reported case involving the argument that section 555(b) applies to a military administrative proceeding is *Cody v. Scott*.<sup>135</sup> *Cody* dealt with the separation of a cadet from the U.S. Military Academy for misconduct. The separation followed an investigative hearing in which the cadet's counsel was not permitted to participate. The cadet contended that the separation proceedings deprived him of his right to counsel guaranteed by the Constitution or by 5 U.S.C. § 555(b).<sup>136</sup> The court found no right to counsel based on two court of appeals decisions that had failed to find a due process right to counsel in cadet disciplinary hearings.<sup>137</sup> The court noted language from *Hagopian v. Knowlton* that "[t]he importance of informality in the proceeding militates against a requirement that the cadet be accorded the right to representation by counsel before the

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<sup>130</sup>545 F.2d 1241 (9th Cir. 1976).

<sup>131</sup>*Id.* at 1244.

<sup>132</sup>*Id.* at 1246.

<sup>133</sup>388 F. Supp. 1213 (M.D. Pa. 1974).

<sup>134</sup>*Id.* at 1222.

<sup>135</sup>565 F. Supp. 1031 (S.D.N.Y. 1983).

<sup>136</sup>*Id.* at 1034.

<sup>137</sup>*Id.* at 1034-35.

Academic Board."<sup>138</sup> Although the court did not explicitly address the literal language of section 555(b), it is apparent that it viewed the same considerations that militated against finding a due process right to counsel as creating an implicit exception to section 555(b).

Judicial recognition of an implicit exception to 5 U.S.C. § 555(b) for military administrative proceedings would be closely analogous to judicial recognition of an implied exception to the Federal Tort Claims Act (FTCA)<sup>139</sup> for a service member's injuries incurred incident to service. The Supreme Court has repeatedly recognized this exception to the FTCA, known as the "Feres doctrine,"<sup>140</sup> despite the FTCA's failure to mention such an exception with other explicit exceptions applicable to activities by the armed forces.<sup>141</sup> The most important reason for the Supreme Court's implying the *Feres* "incident to service" exception to the FTCA was its concern about the effect that tort actions by soldiers would have on military discipline.<sup>142</sup> Similarly, strict application of section 555(b) to the military departments would have potentially devastating effects on military efficiency and discipline. This is apparent since there presently are over two million individuals in uniform in the United States and these individuals routinely take part in many agency proceedings without counsel or personal appearance rights and often are compelled to appear before agency authorities without counsel.

## 2. Right to Notice of Denial and Statement of Reasons under Section 555(e)

Section 555(e) provides in part:

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Basically, this provision requires an agency to give a brief statement of its reasons when it denies a person's written request in con-

<sup>138</sup>*Id.* at 1035 (citing *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972)).

<sup>139</sup>28 U.S.C. § 2680 (1982).

<sup>140</sup>See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977); *Feres v. United States*, 340 U.S. 135 (1950).

<sup>141</sup>See *Jacoby, The Feres Doctrine*, 24 *Hastings L.J.* 1281, 1282-85 (1973).

<sup>142</sup>See, e.g., *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-673 (1977); Note, *In Support of the Feres Doctrine and A Better Definition of "Incident to Service"*, 56 *St. John's L. Rev.* 584, 500-04 (1982).

nection with an agency proceeding.<sup>143</sup> The section's legislative history indicates that such a "brief statement" must be "sufficient to appraise the party of the basis of the denial."<sup>144</sup> Courts have applied the requirements of section 555(e) in a number of contexts, most notably to parole board decisions.<sup>145</sup>

The main limitation on this section are that it applies only to denials, of written applications, petitions or requests, of an interested person, in connection with an agency proceeding. The APA itself does not define "interested person." However the Attorney General's Manual on the Administrative Procedure Act<sup>146</sup> states that an "interested person" may "be defined generally as one whose interests are or will be affected by the agency which may result from the proceeding."<sup>147</sup> As indicated previously in the discussion of section 555(b), the term "agency proceeding" is quite broad and would extend to any agency process for the formulation of the whole or part of a final agency disposition in a matter.

The actual burden that section 555(e) imposes is slight. The section requires only a brief statement. Pursuant to the stipulation of dismissal and the settlement agreement in *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense*,<sup>148</sup> boards for correction of military records and discharge review boards already give far more extensive explanations for their decisions than required by section 555(e). Similarly, the Army provides statements of reasons regarding denial of complaints under Article 138, UCMJ which are indexed and made available to the public pursuant to the settlement in *Hodge v. Alexander*.<sup>149</sup> It seems unlikely that application of the requirement to other military contexts would impose any significant burden. If, in fact, imposition of the requirement would significantly burden a military proceeding, then, arguably, the requirement should not apply.<sup>150</sup>

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<sup>143</sup>See generally Annot., 57 A.L.R. Fed. 765 (1982).

<sup>144</sup>APA Legislative History, *supra* note 12, at 265; Attorney General's Manual, *supra* note 57 at 70.

<sup>145</sup>See, e.g., *King v. United States*, 492 F.2d 1337 (7th Cir. 1974).

<sup>146</sup>Attorney General's Manual, *supra* note 57.

<sup>147</sup>*Id.* at 70.

<sup>148</sup>No. 76-0530 (D.D.C. stipulation of dismissal filed Jan. 31, 1977) (order and settlement agreement July 30, 1982).

<sup>149</sup>No. 77-228 (D.D.C. May 13, 1977).

<sup>150</sup>*Cf. Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 601 (D.C. Cir. 1980) (justifying decision to require statement of reasons in part on fact that requirement imposed no significant burden on the military). See also *supra* text accompanying notes 129-41.

## E. JUDICIAL REVIEW

The APA's provisions on judicial review are codified at 5 U.S.C. §§ 701-706. Congress intended these provisions to restate the law as it existed rather than establish new standards.<sup>151</sup>

Section 701 sets out the applicability of the APA's provisions on judicial review. As mentioned previously, because of the definition of "agency," "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war or in occupied territory" are not reviewable under the APA. Section 701 also indicates that the judicial review provisions of the APA are not applicable to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."<sup>152</sup> There do not appear to be any presently existing statutes that preclude judicial review of any military department's action.<sup>153</sup> However, the phrase "agency action is committed to agency discretion by law" includes the concepts of nonjusticiability and nonreviewability.<sup>154</sup>

Section 702, concerning right of review under the APA, is significant to the military departments because of its waiver of sovereign immunity for nonmonetary claims against agencies.<sup>155</sup> All circuits considering the question have not recognized that the section's waiver applies to "nonstatutory" APA review of agency action under general federal question jurisdiction.<sup>156</sup> However, courts recognize that this waiver does not apply to a suit that would work an intolerable burden on government operations.<sup>157</sup> In addition, section 702 provides that it does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly

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<sup>151</sup>Attorney General's Manual, *supra* note 57, at 93.

<sup>152</sup>5 U.S.C. §§ 701(a)(1), (2) (1982).

<sup>153</sup>Some actions regarding national defense policy, however, are statutorily exempt from judicial review. See, e.g., 50 U.S.C. §§ 47(b), pp. 1216(6) (1982).

<sup>154</sup>See, e.g., *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968).

<sup>155</sup>See Act of October 21, 1976, § 1, Pub. L. No. 94-574, 90 Stat. 2721.

<sup>156</sup>*Sprecher v. Graber*, 716 F.2d 968 (2d Cir. 1983); *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981); *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d 1132, 1138-39 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982); *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979); *Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir. 1978).

<sup>157</sup>See, e.g., *Groves & Sons, Co. v. United States*, 495 F. Supp. 201 (D. Colo. 1980) (no waiver under section 702 where remedy for contract dispute existed under the Tucker Act).

forbids the relief which is sought."<sup>158</sup> Further, the Second Circuit has indicated that the waiver does not apply when Congress has established an exclusive scheme for judicial review of agency activity.<sup>159</sup> Finally, the waiver of sovereign immunity in section 702 should not apply to activities such as courts-martial, military commissions, and military authority exercised in the field in time of war, which are not within the APA's judicial review provisions.

Sections 702 to 705 cover common concepts of judicial review such as standing, ripeness, and relief pending review. Their provisions do not appear to raise any special considerations for review of military department activities.

Section 705 covers the scope of judicial review of agency actions. This section provides in part that a reviewing court shall:

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

One area in which judicial review differs from the language of the APA is in review of the adequacy of the record supporting a military department's denial of conscientious objector status. The language of section 706(2) would indicate an arbitrary and capricious standard

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<sup>158</sup>See, e.g., *McCartin v. Norton*, 674 F.2d 1317, 1322 (D.C. Cir. 1982).

<sup>159</sup>*Sprecher v. Graber*, 716 F.2d 968 (2d Cir. 1983).

applies.<sup>160</sup> In fact, courts almost universally apply a narrower "basis-in-fact" test,<sup>161</sup> described as the narrowest standard known to judicial review.<sup>162</sup> The Fifth Circuit, in *Nicholson v. Brown*,<sup>163</sup> has adopted this narrower standard for judicial review of other internal military activities.

The standards for the scope of judicial review established by section 706 create some special problems when the review is of informal agency action, as is often the case with the military departments. Because many military department actions are not covered by the rulemaking or adjudication provisions of the APA, they are done informally without any detailed administrative record to justify them. Even when there is an administrative record, it may be incomplete. How then is a court to review such actions in the absence of a detailed or complete record? If courts would always require exhaustion of administrative remedies, if a formal administrative remedy existed for every potential claim against the military, and if the administrative remedy created a complete administrative record, this would not be a problem. Courts simply would review the complete administrative record created by an agency, such as the boards for correction of military records. Unfortunately, however, some courts do review claims without requiring exhaustion of administrative remedies and some administrative actions result in less than complete administrative records. What then?

Two Supreme Court cases, *Camp v. Pitts*<sup>164</sup> and *Citizens to Preserve Overton Park v. Volpe*,<sup>165</sup> provide the standard for review of such informal agency actions and address the question of an inadequate administrative record. These cases indicate that an "arbitrary and capricious" standard applies to review of agency action, absent a statutory, "on-the-record," hearing requirement. Further, in limited circumstances, the Court has called for agency supplementation of an inadequate agency record. Courts have supplemented inadequate administrative records through remand, use of affi-

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<sup>160</sup>The "substantial evidence" standard only applies "in a case subject to sections otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706 (1982) (emphasis added). Inservice conscientious objector determinations are not made under any statutory mandate, they are purely regulatory. See 32 C.F.R. § 75 (1983). Absent a statutory "on the record" hearing requirement, the "arbitrary or capricious" standard applies. See *Camp v. Pitts*, 411 U.S. 138, 140-42 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-15 (1971).

<sup>161</sup>See Annot., 10 A.L.R. 2d 15, at §§ 12, 13 (1972).

<sup>162</sup>See *Estep v. United States*, 321 U.S. 114 (1946).

<sup>163</sup>599 F.2d 639 (5th Cir. 1979).

<sup>164</sup>411 U.S. 138 (1973).

<sup>165</sup>401 U.S. 402 (1971).



davits, evidentiary hearings involving agency officials, or allowing limited discovery.<sup>166</sup>

## V. CONCLUSION

The APA does not exempt the military departments in general from its provisions. It does contain almost blanket exceptions for "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war." Further, it exempts military functions from its rulemaking and formal adjudication provisions.

While these exemptions are significant, there are several important requirements that the APA may impose on military administrative actions. First, the military departments must publish "substantive rules of general applicability" in the Federal Register "for guidance of the general public." Second, one could argue that the literal language of the APA requires the military departments to allow military members to be represented by counsel whenever they are compelled to appear before a military department representative or to appear personally and with counsel when they have an interest at stake in a military administrative action. However, a strong argument exists that there is an implicit exception to these requirements for the military. Third, the literal language of the APA, as interpreted by the courts, requires the military departments to provide a brief statement of reasons when they deny certain administrative requests. In addition to these requirements, the APA provides the standards of review for most judicial challenges to military administrative actions.

The area of the greatest potential litigation and development in military administrative practice involves the APA's rights to counsel, personal appearance, and notice of reasons for denial set out in 5 U.S.C. § 555. Courts have begun to apply the notice of reasons for denial requirements of section 555(e) to some military administrative actions. To date, courts have not applied the requirements of section 555(b) regarding counsel and personal appearance to the military. Whether courts will do so, based on the section's literal language, or, instead, imply an exemption for the military because of concerns with discipline and effectiveness, remains to be seen.

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<sup>166</sup>See generally McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 Duke L.J. 333.



## MEDICAL CARE RECOVERY—AN ANALYSIS OF THE GOVERNMENT'S RIGHT TO RECOVER ITS MEDICAL EXPENSES

by Major Bruce E. Kasold\*

*This article examines the five basic methods through which the government can recover its medical expenses, i.e., the Medical Care Recovery Act, med-pay insurance, uninsured motorist coverage, no-fault, and worker's compensation. It discusses the interplay of each recovery method and provides practical guidelines to the recovery judge advocate. In addition, this article concludes that the government has erroneously acquiesced on two issues: the effect of the injured party's contributory negligence on the government's tort claim and the effect of no-fault statutes on the government's tort claim. Finally, by discussing the interplay of each cause of action this article attempts to inspire new efforts in asserting the government's basic right to recover in tort.*

### I. INTRODUCTION

Every year the Department of Defense (DOD)<sup>1</sup> spends millions of dollars for the medical treatment of military personnel, their dependents, and other persons entitled to medical treatment at govern-

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\*Judge Advocate General's Corps, United States Army. Currently assigned as Officer-in-Charge, VII Corps, Augsburg Branch Office, 1984 to present. Formerly assigned as Litigation Attorney, Tort Branch, Litigation Division, Office of The Judge Advocate General, U.S. Army, 1981-83; Chief of Administrative Law, Fort Belvoir, Virginia, 1979-81; Platoon Leader, S-1, 4th Infantry Division (Mechanized), Fort Carson, Colorado, 1973-76. LL.M., Georgetown University Law Center, 1982; J.D., University of Florida, 1979; B.S., United States Military Academy, 1973. Completed 32d Judge Advocate Officer Graduate Course, 1984; 91st Judge Advocate Officer Basic Course, 1979. Author of *Toward Definition of the Bona Fide Seniority System*, 35 U. Fla. L. Rev. 41 (1983). Member of the bars of the State of Florida, the Court of Military Appeals, and the U.S. Army Court of Military Review. This article was originally submitted as a thesis in partial satisfaction of the requirements of the 32d Judge Advocate Officer Graduate Course.

<sup>1</sup>The Veterans Administration and Public Health Service also have recovery programs. In calendar year 1983 agency collections were:

Army:	\$ 8,178,911.60
Navy:	\$ 6,794,610.92
Air Force:	\$ 7,893,667.23
VA:	\$ 6,538,182.00
P.H.S.:	\$ 437,847.41
TOTAL:	\$29,843,219.16

ment expense.<sup>2</sup> A significant portion of these dollars is spent for care rendered for injuries suffered as a result of the tortious conduct of another.<sup>3</sup> An equally significant portion of these dollars is spent for care which may be the contractual or statutory obligation of a third party.<sup>4</sup> Pursuant to congressional statutes and governmental policy, each armed service has instituted a medical care recovery program designed to recover the medical expenses DOD incurs, but which are the contractual obligation of another party or the result of third party negligence.<sup>5</sup> Because of frequent personnel transfers due to military needs, the recovery attorney lacks the luxury of time in developing expertise in this field. To insure an effective program, the attorney must quickly become familiar with the many legal bases upon which the government's medical expenses may be recovered. This article will examine those legal bases and focus on the parameters and weaknesses of the government's right to recover medical expenses and provide practical guidance and suggestions for recovering these expenses. In addition, this article will discuss the interplay of the government's tort cause of action and its contractual or statutory right to benefits. Finally, it will address the degree to which state no-fault laws are affecting the government's right to recover in tort.<sup>6</sup>

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<sup>2</sup>Members of the armed forces and their dependents are entitled to free or subsidized care. 10 U.S.C. §§ 1071-1078 (1982). The government also provides free medical care for federal civilian employees, 5 U.S.C. §§ 8101-8150 (1982); American seamen, 42 U.S.C. § 249 (1976 & Supp. V 1981); Veterans, 38 U.S.C. §§ 610(a), 612 (1976); and Coast Guard, Coast and Geodetic Survey, and Public Health Service Commissioned Corps personnel, 42 U.S.C. § 253(a) (1976).

<sup>3</sup>The Air Force is the only service currently maintaining a breakdown of its collections. In calendar year 1983, it collected \$4,218,761, or roughly 57 percent of its collections from the third party tortfeasor or the insurer. Telephone Conversation with Major William Albright, Government Recovery Section, Claims and Tort Section, Office of The Judge Advocate General, U.S. Air Force.

<sup>4</sup>In calendar year 1983, the Air Force collected \$3,674,906.23, or approximately 47 percent of its collections, pursuant to a contractual or statutory obligation of a third party. *Id.*

<sup>5</sup>*E.g.*, U.S. Dep't of Army, Reg. No. 27-40, Legal Services—Litigation, ch. 5 (15 June 1973); Air Force Reg. No. 112-1, Claims and Tort Litigation, ch. 15 (1 July 1983).

<sup>6</sup>Many contend that the no-fault statutes have completely eliminated the government's tort cause of action. *E.g.*, *United States v. Dairyland Insur. Co.*, 674 F.2d 750 (8th Cir. 1982); Note, *The Federal Medical Care Recovery Act in No-Fault Automobile Insurance Jurisdictions: Extension of the Federal Right of Reimbursement Against No-Fault Insurers*, 21 B.C.L. Rev. 623 (1980).

## II. INITIAL RECOVERY EFFORTS

Medical care recovery efforts by the military<sup>7</sup> began as early as 1948 when the War Department amended an existing regulation to provide for the administrative collection of medical expenses,<sup>8</sup> as well as other related expenses,<sup>9</sup> incurred by the government as a result of injuries to service members caused by the tortious acts of third parties. Potential claims had already reached a significant level<sup>10</sup> when the authority of the government to recoup these expenses was challenged in *United States v. Standard Oil*.<sup>11</sup> This case arose out of a typical vehicular accident case involving clear negligence on the part of an employee of Standard Oil which resulted in injuries to a service member Private John Etzel.<sup>12</sup> Private Etzel spent several days in the hospital at a cost to the government of \$123.34.<sup>13</sup> In addition, he continued to receive his pay while he was hospitalized, amounting to \$69.31.<sup>14</sup> The government's claim for reimbursement of these expenses was denied by Standard Oil and the United States filed suit.<sup>15</sup>

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<sup>7</sup>Some recoveries were being made pursuant to the Federal Employee's Compensation Act of 1916. The Veteran's Administration also began recoveries in the 1930s. For a discussion of these early recoveries, see Long, *The Federal Medical Care Recovery Act: A Case Study in the Creation of Federal Common Law*, 18 Vill. L. Rev. 353, 358-59 (1973).

<sup>8</sup>U.S. Dep't of Army, Reg. No. 25-220, Claims In Favor of The United States, (13 May, 1943). The regulation failed to state any legal basis for the government's claim.

<sup>9</sup>*Id.*

<sup>10</sup>*United States v. Standard Oil*, 332 U.S. 301 (1946). Approximately 450 potential claims had been identified between 1943 and 1946, with 40 new ones being reported monthly at the time *Standard Oil* reached the Supreme Court. *Id.* at 301 n.2.

<sup>11</sup>332 U.S. 301 (1946).

<sup>12</sup>*Id.* at 302.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* The government's right to recover the salary paid to Private Etzel arose out of the same right that it had to recover medical expenses. It is interesting that, after the Supreme Court held that the government did not have a right to recover either, subsequent legislation and recovery efforts focused only on recovering medical expenses. There is no legal reason for this distinction, which probably arose out of the rapid rise in medical expenses and the concern associated with medical costs identified by a 1960 Comptroller General's report. Comptroller General of the United States, *Review of the Government's Rights and Practices Concerning Recovery of the Cost of Hospital and Medical Services in Negligent Third-Party Cases* (1960) [hereinafter cited as Comptroller General Report], cited in Long, *supra* note 7, at 353 n.2. The pay issue was simply neglected. It will not be further addressed in this article other than to note that Congress could seek recovery of these losses if it so desired.

<sup>15</sup>*Id.*

At the district court, the government argued generally that the common law doctrine *per quod servitium amisit*,<sup>16</sup> which arose out of the master-servant relationship and permitted a master to recover damages related to the loss of his servant,<sup>17</sup> should be expanded to include the state-soldier relationship.<sup>18</sup> The district court accepted this analogy and found in favor of the government.<sup>19</sup> Interestingly, the court never addressed the issue of whether state or federal law was applicable and apparently applied general concepts of the common law.<sup>20</sup> On appeal, the Ninth Circuit directly addressed the issue of which law was applicable.<sup>21</sup> Noting the absence of federal legislation in the area, the court determined that state substantive law would be controlling.<sup>22</sup> The court further noted that the master's cause of action for loss of his servant's services had been codified in California<sup>23</sup> and it held that the state-soldier relationship did not fall within this codification.<sup>24</sup> Accordingly, the government had no cause of action.

On certiorari,<sup>25</sup> the Supreme Court upheld the Ninth Circuit's ultimate ruling that the United States could not recover its expenses; however, its rationale was completely different. The Court made two significant decisions which resulted in its affirmance of the appellate court's ruling. First, it held that state law did not govern the issue of whether the government had a cause of action.<sup>26</sup> Second, after noting that there was not existing federal cause of action<sup>27</sup> and recognizing its own ability to either create federal common law<sup>28</sup> or

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<sup>16</sup>60 F. Supp. 807 (S.D. Cal. 1945). Actually, the district court opinion never mentions this cause of action by name. It is clear, however, that this is the cause of action that the government argued should have been applied to its situation. See the Supreme Court's discussion on this subject, *Standard Oil*, 332 U.S. at 312-314. See also Long, *supra* note 7, at 360-62.

<sup>17</sup>Professor Long provides an excellent discussion of the *per quod* cause of action in his article, *supra* note 7, at 355-59, 360-62.

<sup>18</sup>60 F. Supp. at 810.

<sup>19</sup>The district court reasoned that the soldier-state relationship created an even higher duty than the master-servant relationship. *Id.*

<sup>20</sup>*Id.* at 810-13.

<sup>21</sup>153 F.2d 958, 960 (9th Cir. 1946).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 960.

<sup>24</sup>*Id.* at 961.

<sup>25</sup>322 U.S. 301 (1946).

<sup>26</sup>*Id.* at 305. Although it did not do so below, the government argued this position to the Supreme Court. *Id.*

<sup>27</sup>*Id.* at 307.

<sup>28</sup>*Id.* at 308. When Congress has not acted, the courts are free to shape federal common law and may look to state law for guidance. They may also adopt state law as the applicable federal law, in whole or in part. See also Long, *supra* note 7, at 362-67.



adopt existing state law as the federal law,<sup>29</sup> the court elected to defer to Congress to determine what the federal law should be.<sup>30</sup>

In holding that state law was inapplicable to the government's potential tort cause of action, the Court relied heavily on its perception that the state-soldier relationship was uniquely federal in nature and that state law should not govern the rights and duties that arose from it.<sup>31</sup> The Court was also influenced by the belief that the government's attempt to recover its expenses was a matter of federal fiscal policy and better governed by federal law.<sup>32</sup> While it is unclear to what degree this later perception affected the Court's ultimate holding that federal law governed the issue at hand, it is clear that this perception was the primary basis for the Court's deferral to Congress; as landlords of the federal treasury Congress could and should act to protect it.<sup>33</sup> Finally, while the Court's decision to reject the adoption of state law as the governing federal law was also based on this premise,<sup>34</sup> it was equally based on the Court's observation that the mobility of the soldier would subject the government's cause of action, if based on state law, unnecessarily and perhaps quite burdensomely to the vagaries of state law.<sup>35</sup>

It is important to recognize that, after the *Standard Oil* decision, the government had little basis upon which to recover its medical expenses. Medical insurance was limited and no-fault insurance nonexistent.<sup>36</sup> The Court had effectively eliminated any tort cause of action; Congress would have to fill the gap. It is equally important to note that the *Standard Oil* decision did not specifically or even indirectly discuss or consider the government's right to recover its medical expenses pursuant to contract or some basis other than tort.<sup>37</sup> This is understandable since, at the time, these other methods of recovery were limited or nonexistent, and were not raised by the facts.

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<sup>29</sup>322 U.S. at 308.

<sup>30</sup>*Id.* at 310.

<sup>31</sup>*Id.* at 310-11.

<sup>32</sup>*Id.* at 314.

<sup>33</sup>*Id.* at 315-16.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 310-11.

<sup>36</sup>The first automobile no-fault statute was passed by Massachusetts in 1970. Mass. Gen. Laws Ann. ch. 90, §§ 34A-34D (West 1969 & Supp. 1983).

<sup>37</sup>See, e.g., Bernzweig, *P.L. 87-693: An Analysis And Interpretation Of The Federal Medical Care Recovery Act*, 64 Colum. L. Rev. (1964); Long, *supra* note 7.

## III. CONGRESS RESPONDS

In 1960, the Comptroller General issued a report which concluded that the government was spending millions of dollars on medical care for injuries caused by negligent third parties, dollars for which the United States had no means of recovery.<sup>38</sup> Moreover, these dollars were an unnecessary and unfair windfall to the tortfeasor or the insurer who, except for the fortuitous fact that the government had provided the care, would be liable for the injured party's medical expenses.<sup>39</sup> In states adhering to the collateral source doctrine,<sup>40</sup> the injured party received free government medical care and the windfall cost of the medical care from the tortfeasor or the insurer. Three years after this report, some fifteen years after the *Standard Oil* decision, Congress passed the Federal Medical Care Recovery Act.<sup>42</sup> The congressional history amply supports that Congress was interested in preventing the "windfall" to the tortfeasor, his insurer, or the injured party.<sup>43</sup> It was clear that the Act was intended to fill the gap left by *Standard Oil*.<sup>44</sup> In 1962, as in 1947 when *Standard Oil* was decided, medical insurance was limited and no-fault insurance was still non-existent;<sup>45</sup> the Act focused solely on the government's tort cause of action. On the other hand, while Congress reacted to the Supreme Court's challenge to create a federal tort cause of action, it did so in such a way as to rely on state law for the existence of that cause of action, ignoring the concern of the Court that the government's cause of action should not be subject to the vagaries of state law.

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<sup>38</sup>Comptroller General Report, *supra* note 14.

<sup>39</sup>Long, *supra* note 7, at 353.

<sup>40</sup>Under the collateral source rule, the tortiously injured party may receive benefits from a third party and recover the costs of the benefits from the tortfeasor. Without the collateral source rule, these third party benefits would reduce the liability of the tortfeasor. See generally 22 Am. Jur. 2d *Damages* § 206 (1965).

<sup>41</sup>See Annot. 7, A.L.R.3d 516 (1966 & Supp. 1983) (listing states recognizing the collateral source rule).

<sup>42</sup>42 U.S.C. §§ 2651-2653 (1982).

<sup>43</sup>S. Rep. No. 1945, 87th Cong., 2d Sess. 1, reprinted in 1962 U.S. Code Cong. & Ad. News 2637.

<sup>44</sup>*Id.*

<sup>45</sup>See *supra* note 36.

#### IV. THE TORT CAUSE OF ACTION

The Act gives the United States a recovery right based in federal law, superimposed on state substantive law. It also grants the government an independent right to recover its medical expenses as well as a subrogated right. Finally, it provides some procedural rights designed to facilitate recovery efforts.

##### A. THE INDEPENDENT RIGHT

An independent cause of action is one which is neither dependent nor affected by the defenses peculiar to another's cause of action. Thus, under the *per quod servitium amisit* cause of action, a master could sue a tortfeasor for the medical expenses that the master had incurred in providing care to the injured servant, regardless of the servant's right to sue the tortfeasor.<sup>46</sup> If the servant gave the tortfeasor a full release, this would have no effect on the master's right to sue the tortfeasor. The congressional history supports the conclusion that Congress attempted to create this type of independent cause of action when it passed the Act.<sup>47</sup> Nevertheless, the actual wording of the Act is confusion. The Act provides:

In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers or seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so

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<sup>46</sup>See *supra* note 17 and accompanying text.

<sup>47</sup>S. Rep. No. 1945, 87th Cong., 2d Sess. 1, reprinted in 1962 U.S. Code Cong. & Ad. News 2637. See also Long, *supra* note 7, at 367-39.

furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.<sup>48</sup>

If Congress wished to create an independent cause of action, it was anomalous to provide that the United States' right "is subrogated to any right or claim" that the injured party had for the medical expenses. Moreover, it was difficult to discern why the Act provided that the United States may require an assignment of the injured party's right to recover these expenses.

Although commentators have recognized the ambiguity and called for various conclusions,<sup>49</sup> the courts have over the past twenty-two years unanimously concluded that the United States does indeed have an independent cause of action.<sup>50</sup> Thus, a release given by the injured party to the tortfeasor has no effect on the government's right to recover from the tortfeasor.<sup>51</sup> Similarly, if the injured party brings suit and settles or wins the case, the government is not barred from instituting a separate suit and recovering its medical expenses.<sup>52</sup> The tortfeasor has been held to have been charged with knowledge of the statute and a presumption was created that the medical records were reviewed before settlement had been reached or judicial decision had been rendered.<sup>53</sup>

It is important to note that the government's cause of action is against the tortfeasor and not the tortfeasor's insurer.<sup>54</sup> While it is undoubtedly true that most recoveries are ultimately paid by the insurer, the Act gives no direct cause of action against the insurer. The

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<sup>48</sup>42 U.S.C. § 2651(a) (1982).

<sup>49</sup>One interpretation is that the United States only had a subrogation right. See Groce, *The Medical Care Recovery Act And Its Side Effects*, 36 Ins. Counsel J. 1259 (1969). Another view is that the government was granted an independent right which could be enforced through subrogation. See, e.g., Noone, *May Plaintiff Include The United States' Claim Under The Medical Care Recovery Act Without Government Intervention?* 10 A.F. JAG L. Rev. 20 (1968). For additional interpretations see Long, *supra* note 7, at 367-73.

<sup>50</sup>E.g., *United States v. York*, 348 F.2d 582 (6th Cir. 1968); *United States v. Neal*, 443 F. Supp. 1307 (D. Neb. 1978).

<sup>51</sup>*United States v. York*, 348 F.2d 582 (6th Cir. 1968); *United States v. Winter*, 275 F. Supp. 895 (E.D. Pa. 1967).

<sup>52</sup>E.g., *United States v. Bartholomew*, 266 F. Supp. 213 (W.D. Okla. 1969).

<sup>53</sup>*Id.*

<sup>54</sup>*United States v. Farm Bureau Ins. Co.*, 527 F.2d 564 (8th Cir. 1976).

liability of the insurance companies arises solely from their contractual obligation to the tortfeasor.<sup>55</sup> The courts have, however, held the insurer to the same constructive notice as the tortfeasor. Therefore, their lack of actual notice is not a defense to their contractual obligation to pay for the tortfeasor's liability, once liability has been established.<sup>56</sup>

The independent cause of action also permits the United States to recover in states which do not recognize the collateral source doctrine.<sup>57</sup> The inability of the injured party to recover these expenses has no effect on the government's claim. Other aspects of the independent cause of action include the right to institute suit separately from the injured party's suit<sup>58</sup> and the lack of any requirement that an assignment be obtained from the injured party.<sup>59</sup> There are several other aspects closely related to the government's independent right such as the effect of state immunity laws and guest statutes, but these are also related to the issue of which substantive law governs the government's cause of action and they will be discussed later under the substantive law heading.<sup>60</sup>

## B. THE SUBROGATED RIGHT

While the government's independent cause of action is well recognized, its subrogated one is not. Under a true subrogation, the United States would be able to "step into the shoes" of the injured party and assume his or her right to recover medical expenses.<sup>61</sup> The government's right to recover would be completely dependent on the injured party's right to recover. Thus, in states which do not recognize the collateral source doctrine, the injured person would be barred from recovering medical expenses for which he did not pay.

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<sup>55</sup>*Id.*

<sup>56</sup>*United States v. Bartholomew*, 266 F. Supp. 213 (W.D. Okla. 1969).

<sup>57</sup>If the government's claim was solely subrogated, the United States would be unable to recover its expenses in a non-collateral source state because the injured party would have no right to recover these expenses. Hence, there would be no right to which the government could be subrogated.

<sup>58</sup>The government must wait six months after initial care is provided the injured party, however, before initiating the separate suit. 42 U.S.C. § 2651(b) (1982). See *infra* text accompanying notes 132-39.

<sup>59</sup>E.g., *United States v. York*, 398 F.2d 582 (6th Cir. 1968); *United States v. Wat-trock*, 268 F. Supp. 325 (E.D. Pa. 1967).

<sup>60</sup>See *infra* text accompanying notes 68-73.

<sup>61</sup>Subrogation is broadly defined as the substitution of one person for another concerning a legal claim or right. See generally 77 Am. Jur. 2d *Subrogation* §§ 1-142 (1974).

Under a subrogated right, the United States would therefore have no right to recover its medical expenses. Similarly, contributory negligence, state statutes of limitation, and other defenses peculiar to the tortfeasor would act to bar the government's subrogated claim.<sup>62</sup> Yet, in at least one instance, the government may find it desirable to assert a subrogated claim. If, for example, the independent cause of action is barred by the three year federal statute of limitations<sup>63</sup> but the injured party's claim is not yet barred by the applicable state statute of limitations, the government would find it advantageous to assert a subrogated claim and reap the benefit of the longer state statute of limitations.<sup>64</sup>

The position that the government has a subrogated as well as an independent cause of action has been suggested in several commentaries<sup>65</sup> and adopted, in dicta, by two courts.<sup>66</sup> It has never, however, been germane to a case holding. Moreover, in at least one decision, the injured party was permitted to recover the cost of his medical care on the theory that the United States' claim was an independent one which was barred by its failure to file suit within the three year federal statute of limitations.<sup>67</sup>

It is not recommended that the United States wait until the three year statute of limitations has expired, but, if faced with the situation, the possibility of a subrogated right should be examined.

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<sup>62</sup>*Id.* at 129.

<sup>63</sup>28 U.S.C. § 2415(b) (1976). See *infra* accompanying notes 74-81.

<sup>64</sup>*E.g.*, Fla. Stat. Ann. § 95.11 (West 1982) (4 year statute of limitations); N.H. Rev. Stat. Ann. § 4 (1983) (6 year statute of limitations). In addition, many shorter state statutes of limitations may be tolled for a variety of reasons; these statutes effectively extend the period in which suit could be brought. *E.g.*, Alabama has a 1 year statute of limitations, Ala. Code § 6-2-39 (1982). This is tolled, however, if the tortfeasor is absent from the state, *id.* at § 6-2-10, or if the injured party is under 19 years of age, *id.* at § 6-2-8.

<sup>65</sup>Turner, *Hospital Recovery Claims* (42 U.S.C. 2651): *The United States as a Subrogee*, 12 JAG L. Rev. 44 (1970); Comment, *The Right And Remedies Of The United States Under The Federal Medical Care Recovery Act*, 74 Dick. L. Rev. 115, 126-29 (1969-70).

<sup>66</sup>*United States v. Neal*, 443 F. Supp. 1307 (D. Neb. 1978); *Tolliver v. Shumate*, 151 W. Va. 105, 150 S.E.2d 579 (1966).

<sup>67</sup>*Whitaker v. Talbot*, 177 S.E.2d 381 (Ga. Ct. App. 1970). *Cf.* *Arvin v. Patterson*, 427 S.W.2d 643 (Tex. App. 1968).



### C. THE SUBSTANTIVE LAW

To the extent the United States has a subrogated cause of action, this right is governed by state law and subject to any defenses that the tortfeasor may have against the injured party. The independent cause of action, on the other hand, is governed by federal law, although in certain instances the state law has been adopted as federal law.

With Congress focusing on the tort cause of action, it gave the government a right to recover medical expenses from a third party only when the injuries for which care was rendered were suffered under circumstances creating a tort liability on the third party. An obvious and key limitation to the government's recovery is that there be the creation of some tort liability.<sup>68</sup>

Whether federal common law should be determinative of what circumstances create tort liability, or whether state law should be adopted as the governing federal law was never addressed by Congress;<sup>69</sup> the decision was left to the courts. Surprisingly, this important issue, the same one that faced the Supreme Court in *Standard Oil*, was not fully addressed until the *United States v. Neal*<sup>70</sup> decision in 1978. By that time, however, in deciding related issues, the courts had unanimously assumed that state law controlled the creation of tort liability.<sup>71</sup> Not surprisingly, the district court in *Neal* reached this same conclusion, albeit after a full analysis.<sup>72</sup> This conclusion makes the government's cause of action subject to the vagaries of state law; a tort in one state may not be a tort in another state. While the greatest impact of this decision occurs in states whose no-fault law eliminates tort liability,<sup>73</sup> it also significantly impacts upon the tort cause of action itself.

#### 1. State Statute Of Limitations

One of the initial issues concerning the government's cause of action was whether the state or federal statute of limitations was applicable. Proponents of the state statute of limitations argued that, since the Act relied on state law to determine the existence of tort

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<sup>68</sup>42 U.S.C. § 2651(a) (1982).

<sup>69</sup>S. Rep. No. 1945, 87th Cong., 2d Sess. 1, reprinted in 1962 U.S. Code Cong. & Ad. News 2637.

<sup>70</sup>443 F. Supp. 1307, 1311 (D. Neb. 1978).

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>See *infra* text accompanying notes 216-87.

liability, the state statute of limitations should also be applicable.<sup>74</sup> Thus, if an injured party's cause of action was barred because of the state statute of limitations, the government's cause of action should also be barred; the tort liability no longer existed.

The initial decision on this matter, followed unanimously by the other courts, was rendered in *United States v. Fort Benning Rifle and Pistol Club*.<sup>75</sup> The court rejected the applicability of the state statute of limitations because it did not comport with the literal wording of the Act nor the intent of Congress.<sup>76</sup> The Act literally gave the United States a cause of action whenever the circumstances surrounding the injury "creat[ed] tort liability upon some third person . . . ."<sup>77</sup> The statute of limitations, while it curtailed a person's right to bring a cause of action, had "nothing to do" with whether a tort cause of action was created or not.<sup>78</sup> Moreover, Congress clearly attempted to create an independent cause of action in favor of the United States, not subject to the procedural defenses that a tortfeasor may raise against an injured party.<sup>79</sup> Once tort liability was created, the United States had a cause of action. In dictum, the court noted that a state substantive defense might negate the creation of tort liability, but the court refused to delineate those that would do so.<sup>80</sup> It did caution, however, that the distinction would not necessarily be determined by "the traditional but uncertain line between 'procedure' and 'substance.'"<sup>81</sup>

## 2. Family Immunity Laws

The effect that a state family immunity law might have on the government's cause of action was first addressed by the Fifth Circuit in *United States v. Haymes*.<sup>82</sup> In *Haymes*, the wife of a serviceman was a passenger in a car owned and operated by the husband when she suffered injuries as a result of the husband's negligence.<sup>83</sup> The husband refused to reimburse the government for its medical expenses, arguing he was not liable because there was no tort cause of action for a wife (injured party) to recover medical expenses from

<sup>74</sup>*United States v. Fort Benning Rifle and Pistol Club*, 387 F.2d 884 (5th Cir. 1967).

<sup>75</sup>*Id.* See also *United States v. Government Employees Ins. Co.*, 409 F.2d 117 (3d Cir. 1969); *Forrester v. United States*, 308 F. Supp. 1157 (W.D. Pa. 1970).

<sup>76</sup>387 F.2d at 886-87.

<sup>77</sup>*Id.* at 887. See also 42 U.S.C. § 2651(a) (1982).

<sup>78</sup>387 F.2d at 887.

<sup>79</sup>*Id.* See also Long, *supra* note 7, at 367-69.

<sup>80</sup>387 F.2d at 887.

<sup>81</sup>*Id.*

<sup>82</sup>445 F.2d 907 (5th Cir. 1971).

<sup>83</sup>*Id.* at 908.

her husband (the third party).<sup>84</sup> Under Louisiana law, the husband had the sole right to recover the medical expenses and a suit against himself was a nullity.<sup>85</sup>

The court, in rejecting the husband's argument, examined the underlying immunity law. It perceived the husband's legal ownership of the claims for medical expenses as a procedural device "in no way a circumstance creating or negating tort liability."<sup>86</sup> There was no substantive defense negating the wife's claim against the husband; rather, the wife was merely precluded from bringing suit.<sup>87</sup>

In *United States v. Moore*,<sup>28</sup> the Third Circuit followed suit. In *Moore*, the husband and child were injured in an automobile accident through the negligence of the wife.<sup>89</sup> Maine had a family immunity law precluding family members from suing a spouse or parent.<sup>90</sup> The district court interpreted this statute as purging any tort liability of the parent or spouse.<sup>91</sup> The appellate court, however, interpreted it as merely imposing a "legal disability" on the family member preventing them from bringing suit against the spouse or parent.<sup>92</sup> Tort liability existed, it just could not be enforced by a family member.

Both of these cases, the only cases to address the intrafamily immunity laws, stem from the Supreme Court's decision in *Standard Oil* that the federal cause of action should not be subject to the vagaries of state law.<sup>93</sup> While Congress apparently intended this result, it nevertheless hinged the government's cause of action on the creation of tort liability between the injured party and the third party. This created a dilemma for the courts. On the one hand, it was clear that the intra-family immunity laws barred suit by one spouse or family member against another. On the other hand, under normal circumstances, tort liability would have been enforceable. By construing the intra-family immunity laws as procedural, the courts satisfied the objectives of both statutes. The government could

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<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 910.

<sup>87</sup>*Id.*

<sup>88</sup>469 F.2d 788 (3d Cir. 1972).

<sup>89</sup>*Id.* at 790.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* See also *Henry I. Siegel Co. v. Koratron Co.*, 311 F. Supp. 697 (M.D. Pa. 1972).

<sup>92</sup>469 F.2d at 794. Judge Biggs presented a vigorous dissent, arguing that Maine's interspousal immunity law actually eliminated tort liability and the government should not be allowed to recover. *Id.* at 794-803 (Biggs, J., dissenting).

<sup>93</sup>*Haymes*, 445 F.2d at 910; *Moore*, 469 F.2d at 793-94.

recover because tort liability had been created. Yet, the state purpose for establishing intra-family immunity would remain unaffected—family members were still precluded from suing each other.

### 3. *Automobile Guest Statutes*

Guest statutes generally require a higher degree of negligence to be established before a non-paying automobile passenger may sue the driver for any injuries the passenger may suffer.<sup>94</sup> They pose the same issue presented by the intra-family immunity laws; to what extent will they affect the government's right to recover its medical expenses?

The early decisions were heavily influenced by the intra-family immunity cases and viewed the guest statutes as merely creating a procedural hurdle to the injured party's tort claim.<sup>95</sup> Tort liability existed; it just could not be enforced by the injured party unless gross negligence could be established. Since tort liability had been created, the government had a cause of action. Moreover, the government's recovery right was not conditioned on establishing gross negligence; under the Act, ordinary negligence would suffice.<sup>96</sup>

In a sharp break from these earlier decisions, two fairly recent cases have rejected this analysis.<sup>97</sup> The first of these cases, *United States v. Neal*,<sup>98</sup> fully analyzed the issue. In *Neal*, the district court was more impressed by the dissimilarity between the intra-family immunity laws and the guest statutes than their similarity.<sup>99</sup> The court noted that the family immunity law established an affirmative defense to be raised by the defendant and, therefore, it would be regarded as a procedural bar to one's liability.<sup>100</sup> The tort liability existed, but could not be enforced because of the family immunity. The guest statute, however, affected the substantive right of the injured party; there was no tort liability unless the injured party was injured as a result of gross negligence.<sup>101</sup> This was not an affirmative defense

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<sup>94</sup>Guest statutes, which abrogate the general common law rule, have been adopted in most states. 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 536 (1980).

<sup>95</sup>*United States v. Forte*, 427 F. Supp. 340 (D. Del. 1977); *Government Employees Insur. Co. v. Bates*, 414 F. Supp. 658 (E.D. Ark. 1975).

<sup>96</sup>*Id.*

<sup>97</sup>*United States v. Oliveria*, 489 F. Supp. 981 (D.S.D. 1980); *United States v. Neal*, 443 F. Supp. 1307 (D. Neb. 1978).

<sup>98</sup>443 F. Supp. 1307 (D. Neb. 1978).

<sup>99</sup>*Id.* at 1312.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

to be raised by the defendant to avoid tort liability; the liability simply did not exist without it.<sup>102</sup> Under this theory, the government was denied its recovery right, unless gross negligence could be established, because tort liability had never existed.

The government attorney faced with a guest statute must be aware of both applications. Obviously, the attorney should seek to have the guest statute construed as it was in the early decisions, a procedural hurdle instead of the elimination of tort liability from the outset. Unfortunately, it is difficult to attack the *Neal* analysis. The guest statute appears to be a broad blanket elimination of ordinary tort liability and, without tort liability, the government has no cause of action under the Act. This elimination of traditional tort liability encroaches on the breadth and scope of the Act and it foreshadowed the much greater encroachment arguably visited by the advent of no-fault statutes.<sup>103</sup>

#### 4. Contributory Negligence

Surprisingly, there is little case law on the effect contributory or comparative negligence will have on the government's cause of action. The contributory negligence issue could arise in three situations, each of which will be examined separately. In the most common situation, the injured party is contributorily negligent, but is not a government employee at the time of the accident or at least is not within the scope of government duties if an employee. In a suit against a third party, the contributory negligence will bar or reduce the injured party's recovery. But the effect that it will have on the government's cause of action has never been directly addressed by the courts. In an early case, one court stated in dictum that the government's cause of action could be defeated by the contributory negligence of the injured party.<sup>104</sup> In *United States v. Housing Authority of Bremerton*,<sup>105</sup> the Ninth Circuit addressed the issue of whether the parents' contributory negligence in injuries sustained by their child would act to bar a claim by the United States against the co-negligent Housing Authority.<sup>106</sup> Inasmuch as the contributory negligence was not attributable to the injured child, it was held to have no affect on the child's cause of action.<sup>107</sup> Similarly, the court

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<sup>102</sup>*Id.*

<sup>103</sup>See *infra* text accompanying notes 215-87.

<sup>104</sup>*United States v. Greene*, 266 F. Supp. 976 (N.D. Ill. 1967).

<sup>105</sup>415 F.2d 239 (9th Cir. 1969).

<sup>106</sup>*Id.* at 240.

<sup>107</sup>*Id.* at 243.

held that it had no effect on the government's cause of action.<sup>108</sup> In dictum, however, the court indicated that, had the injured party been contributorily negligent, defeating his own claim, the government's claim would have also been defeated.<sup>109</sup> In yet another case, *Maddux v. Cox*,<sup>110</sup> the Eighth Circuit rejected the argument that the government's contributory negligence would offset the liability of a third party when that contributory negligence was not attributable to the injured party. As in *Housing Authority*, however, the court implied that the contributory negligence of the injured party would bar or reduce the government's claim for medical expenses.<sup>111</sup>

Perhaps because of these implications that the government's claim is subject to the contributory negligence of the injured party, the government, in practice, has acquiesced. This appears, however, to be giving up the ship without a fight. At least one commentator has suggested that the government's cause of action be treated as if it were a right *per quod servitium amisit*, the type of independent right that Congress attempted to create in favor of the government.<sup>112</sup> Dean Prosser and other notable legal scholars have contended that contributory negligence should have no bearing on recovery *per quod*.<sup>113</sup> Nevertheless, sole reliance on an analogy to this cause of action is not fully satisfactory because a number of cases have held that the *per quod* cause of action is subject to contributory negligence.<sup>114</sup>

The recent decision and analysis in *United States v. Neal*,<sup>115</sup> however, offer strong support for the position that contributory negligence of the injured party should not affect the government's independent right to recover its medical expenses. In *Neal*, the court looked to the state substantive law to see if it created tort liability. If it did, then the government had a cause of action under the Act which was not affected by affirmative defenses which the third party could raise against the injured party. The government's cause of action would only be affected if the state law eliminated a tort cause

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<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

<sup>110</sup>382 F.2d 119 (8th Cir. 1967).

<sup>111</sup>*Id.* at 124.

<sup>112</sup>Long, *supra* note 7, at 379.

<sup>113</sup>*Id.* Many cases have held the *per quod* cause of action to be barred by contributory negligence. Professor Long concurs with Dean Prosser in suggesting that these cases are wrongly decided. See W. Prosser, *Torts* 892 (4th ed. 1971).

<sup>114</sup>*E.g.*, *Pioneer Constr. Co. v. Bergeron*, 172 Colo. 474, 462 P.2d 589 (1969); *Wineman v. Carter*, 212 Minn. 298, 4 N.W.2d 83 (1942).

<sup>115</sup>443 F. Supp. 1307 D. Neb. 1978). See *supra* text accompanying notes 98-103.



of action or failed to recognize it. Under this theory, the contributory or comparative negligence of the injured party, which are affirmative defenses to be raised by the third party, would not affect the government's claim. This approach toward the government's cause of action creates a proper balance between the reliance on state law for existence of a cause of action and the need to protect the government's claim from the vagaries of that very state law. The government's cause of action is dependent on state law only for its creation not its subsequent diminution. It is submitted that, when the injured party is contributorily or comparatively negligent, the government should vigorously pursue its full claim and not reduce or negotiate it based solely on the existence of the injured party's negligence.

The second situation presents a more difficult case for the government. In this situation, the contributorily negligent injured party is a government employee acting within the scope of his duties at the time of the accident. The employee's negligence is imputed to the government, making the government liable for damages to the third party. While no case specifically addressed the issue concerning the government's counterclaim for medical expenses, the general rule is that responsibility is applied "both ways."<sup>116</sup> Thus, the government will probably be imputed with the contributory negligence in its role as a plaintiff just as it was in its role as a defendant. This comports with the concept of fairness which would act to preclude the government from shirking its own contributory negligence. Because of this "both ways" rule, when the injured party is a government employee, the recovery attorney should determine if the employee was acting within the scope of his or her duties at the time of the accident. If he or she was, the attorney should be prepared to negotiate the government's claim based on the contributory negligence of the injured party. At a minimum, this type of case should not be used to test the applicability of the injured party's contributory negligence to the government's claim.

The final situation is presented when a government employee, within the scope of his or her duties, is contributorily negligent with a third party in causing injuries to another government employee who was not negligent at all. This scenario has been visited twice by the courts with opposite results.

In *California-Pacific Utilities Co. v. United States*,<sup>117</sup> a soldier received severe injuries when a radio antenna that he was carrying

<sup>116</sup>W. Prosser, Torts 488 (4th ed. 1971).

<sup>117</sup>194 Ct. Cl. 703 (1971).

hit some electric power lines. He was found not to be negligent but his supervisors, and thus the United States, were held negligent for not warning him about the electric lines.<sup>118</sup> In addition, the utility company was held negligent for failing to maintain the lines in accordance with required standards.<sup>119</sup> With little discussion and reliance only on the dictum of an earlier case that contributory negligence would bar the government's claim, the court held that the United States' claim was barred by its contributory negligence.<sup>120</sup>

In *Maddux v. Cox*,<sup>121</sup> a government employee, Cox, was injured in an automobile accident while he was a passenger in a government vehicle. While he was not negligent, the driver of the government vehicle and the driver of the other vehicle, Maddux, were both found contributorily negligent.<sup>122</sup> Cox sued Maddux for his injuries and Maddux, who was also injured, sued the United States.<sup>123</sup> The United States counterclaimed for its medical expenses related to Cox's injuries.<sup>124</sup>

Since Cox was not contributorily negligent, he was entitled to a full award of damages against Maddux. The government driver and Maddux were joint tortfeasors and Cox could elect to recover against either.<sup>125</sup> Maddux argued, however, that the government's claim should be offset by the negligence of the government driver which was imputed to the government.<sup>126</sup> Focusing on the basis of the government's claim, the court rejected this argument.<sup>127</sup> Under the Act, the government's claim arose out of the liability of Maddux to Cox.<sup>128</sup> The coincidental liability of the government to Maddux, based on the government driver's negligence, had no effect on the Maddux-Cox liability.<sup>129</sup> Accordingly, the government driver's negligence was held to have no effect on the government's claim for medical expenses.<sup>130</sup>

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<sup>118</sup>*Id.* at 727.

<sup>119</sup>*Id.* at 725.

<sup>120</sup>*Id.* at 731.

<sup>121</sup>382 F.2d 119 (8th Cir. 1967).

<sup>122</sup>*Id.* at 120. See 255 F. Supp. 517 (E.D. Ark. 1966) (the district court's opinion).

<sup>123</sup>382 F.2d at 120.

<sup>124</sup>*Id.*

<sup>125</sup>Cox elected to recover from Maddux since, as a soldier, Cox was precluded from bringing suit against the United States. *Feres v. United States*, 340 U.S. 135 (1950).

<sup>126</sup>382 F.2d at 124.

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

Because they lacked a full analysis of the issue, neither of these cases is very helpful in determining what outcome might result today. Moreover, the *Neal* rationale cannot be directly applied because the government was contributorily negligent in causing the injuries for which it later provided care. This is not a case where the injured party's negligence acts to reduce or negate the government's claim. Instead, it is a case where the government's own negligence would affect its claim. The "both ways" rationale is similarly not directly applicable because the injured party was not the actor whose negligence is imputed to the government. Yet, the same fairness concept that arises in the cases applying the "both ways" rationale arises in this situation. When the government is partially to blame for the injuries which give rise to its medical claim, it should not be able to avoid that negligence. Accordingly, while the *Maddux* case holds that the government is entitled to recover its expenses, it is questionable whether this decision will be followed. It is recommended that the government continue to negotiate its claims based on its own contributory negligence, and, as noted above, not use this fact situation to test the contributory negligence issue.

#### **D. THE PROCEDURAL RIGHTS**

The Act provides many procedural advantages or rights which the United States may utilize to assist or enforce collection of its tort claim.<sup>131</sup> Thus, the government may bring an independent suit, or intervene in the injured party's suit against the tortfeasor. In addition, injured parties may bring suit on their own behalves and recover on behalf of the United States. Finally, the statute authorizes the President to prescribe the reasonable rates for the medical care provided.

The Act states as follows:

The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the

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<sup>131</sup>For an early discussion of the administration of the Act, see Long, *Administration of the Federal Medical Care Recovery Act*, 46 Notre Dame Law. 253 (1970-71).

injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors.<sup>132</sup>

### 1. *The Independent Suit vs. Intervention*

The Act clearly permits the United States to file a separate suit if the injured party fails to institute legal proceedings within six months of his initial government provided medical care. It also permits the United States to intervene in the injured party's case once it is filed. It is not clear, however, if the United States is limited solely to intervention if the injured party files within the six month period, or if the government may still initiate separate legal proceedings. Proponents of limiting the government's options have argued that the statute was intended to preclude multiple litigation by requiring intervention in all cases except when the injured party failed to file suit within the six month period.<sup>133</sup> Opponents have argued that this provision was merely optional to the government and that a strict interpretation would create a procedural statute of limitations barring the government's right to recover unless it intervened in the injured party's suit.<sup>134</sup>

In a series of cases culminating in *United States v. Housing Authority of Bremerton*,<sup>135</sup> the courts<sup>136</sup> have rejected the argument that the government had to intervene in the injured party's case if that suit was filed within the six month period. The statutory authorization to either intervene or file a separate suit was construed as stating options available to the government, rather than limiting the government to a particular procedure.<sup>137</sup>

These decisions permit the government attorney to elect in every case whether to intervene or file a separate suit. While the decision is often a personal one based on the location of the injured party's

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<sup>132</sup>42 U.S.C. § 2651(b) (1982).

<sup>133</sup>Comment, *The Right And Remedies Of The United States Under The Federal Medical Care Recovery Act*, 74 Dick. L. Rev. 115, 124 (1969-70).

<sup>134</sup>*Id.*

<sup>135</sup>415 F.2d 239 (9th Cir. 1969).

<sup>136</sup>*United States v. York*, 398 F.2d 582 (6th Cir. 1968); *United States v. Nation*, 299 F. Supp. 266 (N.D. Okla. 1969).

<sup>137</sup>415 F.2d at 241.

proceeding and the familiarity with state court rules, other practical considerations should also be weighed. If the case involves a statute of limitations or contributory negligence issue which may bar the injured party's claim but will not affect the government's claim, then the attorney should consider filing an independent suit to avoid confusion of the issues. On the other hand, when the substantive issues are the same, the attorney should seriously consider intervening in the injured party's case. The injured party's pleadings could be adopted and the injured party could be left to prove the negligence issue. The attorney need only prove the government's damages, putting a minimum strain on limited manpower resources. Moreover, because most jurisdictions follow the rule that judgments are to be paid in order to date awarded rather than in a pro rata fashion,<sup>138</sup> the intervention insures that the available money will not be paid to the injured party before the government is awarded judgment, a fate that could occur when only limited resources are available and the government's independently filed suit is decided after the injured party's suit.<sup>139</sup> To avoid this problem and to reduce his workload, the government attorney should seriously consider intervening in the injured party's case rather than filing an independent action whenever the substantive issues are the same.

## 2. *Using The Private Attorney*

The Act specifically provides two procedural means to enforce the government's claims: intervention or independent suit.<sup>140</sup> To the extent that the government has a true subrogation right, it would also be permissible for the injured party to recover the medical expenses as subrogor and reimburse the United States.<sup>141</sup> Of course, this procedure would be governed by state law and could only take place in a collateral source state where the injured party had a right to recover the medical expenses.<sup>142</sup>

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<sup>138</sup>Annot., 70 A.L.R.2d 416, 419-22 (1960).

<sup>139</sup>This is demonstrated by the following example: The tortfeasor has only \$25,000 worth of insurance and is otherwise judgment-proof. The injured party files a tort suit and wins a \$25,000 judgment on 1 January. The government files an independent suit and is awarded its medical costs of \$1,000; the date of the award is 15 January. In most jurisdictions, the injured party will collect his entire claim because his award, pre-dating the government's, has priority. The United States is left with an uncollectable judgment. If the government had intervened, however, the available money would have been equitably divided by the court.

<sup>140</sup>42 U.S.C. § 2651(b) (1982).

<sup>141</sup>See *supra* text accompanying notes 61-67.

<sup>142</sup>In a non-collateral source state, the injured party would have no right to recover the medical expenses from the tortfeasor; the United States would therefore have no right to which it could be subrogated.

In *Palmer v. Sterling Drugs, Inc.*,<sup>143</sup> a fourth procedure was recognized. In *Palmer*, the government authorized the injured party to assert the government's claim as an item of special damages in the suit brought by the injured party against the tortfeasor.<sup>144</sup> The United States did not intervene in the action, nor was it asserting a substantive subrogation right. Rather, the injured party was asserting the independent right of the United States to receive its medical expenses through the procedural means of subrogation.<sup>145</sup> Judicial recognition of this procedure grew out of a liberal interpretation of the subrogation language in the Act.<sup>146</sup> Instead of simply giving the United States a substantive subrogation right, the Act was construed as permitting the United States' independent right to be enforced through the subrogation procedure.<sup>147</sup>

This procedure is significant because it relieves the recovery attorney of the litigation responsibilities associated with the government's cause of action,<sup>148</sup> it costs nothing,<sup>149</sup> and the government is still entitled to the benefits of its independent claim. Because of the obvious savings in work, the government often authorizes the injured party to assert the government's claim. This authorization must be in writing and no fee is authorized.<sup>150</sup>

The lack of fee raises the question of why a private attorney would handle the government's claim. Generally, the private attorney can expect assistance from the government attorney in the location of military witnesses, the gathering of medical records and other pertinent records, and the scheduling of depositions of military personnel.<sup>151</sup> In addition, there is the added benefit of negotiating with the tortfeasor or insurance company without the presence of another party, the government, who might interfere with the settlement posture. The use of the government's medical costs as an

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<sup>143</sup>343 F. Supp. 692 (E.D. Pa. 1972). See also *Albright v. A.J. Reynolds*, 485 F.2d 678 (3d Cir. 1972); *Leatherman v. Pollard Trucking Co.*, 482 F. Supp. 351 (E.D. Okla. 1978); *Matney v. Evans*, 598 P.2d 644 (N.M. 1979).

<sup>144</sup>343 F. Supp. at 693.

<sup>145</sup>*Id.*

<sup>146</sup>*Id.* at 694.

<sup>147</sup>*Id.*

<sup>148</sup>Of course, the recovery attorney has ultimate responsibility for the government's claim and he must continue to monitor the case.

<sup>149</sup>Federal law precludes paying the private attorney a fee for presenting the government's claim. 5 U.S.C. § 3106 (1982).

<sup>150</sup>See, e.g., U.S. Dep't of Army, Reg. No. 27-40, Legal Services—Litigation, para. 5-16 (15 June 1973).

<sup>151</sup>*Id.* at para. 7-14b also permits the recovery attorney to provide doctors for depositions and use at trial under limited circumstances.



item of special damages for the injured party may also increase the ultimate award of damages.<sup>152</sup> Finally, the private attorney will be able to develop a good working relationship with the government attorney and be better able to explain the nature of his client's situation which may cause the government to waive or compromise a claim.<sup>153</sup> In short, use of the private attorney to collect the government's claim can often facilitate settlement for both the injured party and the government as well as reduce the workload of the federal attorney.

### 3. Proving Medical Expenses

The Act's provision<sup>154</sup> that the President may prescribe regulations to determine the reasonable value of medical care provided to the injured party has resulted in a rather simplified method of proving the government's damages. The President has delegated his authority to prescribe these regulations to the Office of Management and Budget (OMB).<sup>155</sup> Usually on a yearly basis, OMB publishes in the Federal Register the daily rates for care provided by the military hospitals, for both in-patient and out-patient care.<sup>156</sup> These rates have generally been awarded the presumption of reasonableness and are not subject to attack at court,<sup>156</sup> although the actual number of days that care was provided can be attacked in court as unreasonable.<sup>158</sup>

While it had been a settled area of the law, a recent case raises the possibility of renewed litigation. In *Wall v. United States*,<sup>159</sup> the

<sup>152</sup>Peterson, *Agreeing To Protect The Interests Of The United States Under The Medical Care Recovery Act: Some Ethical Problems For The Attorney*, 30 JAG J. 203, 204 (1978).

<sup>153</sup>For a discussion of some of the ethical problems associated with the use of a private attorney, see Peterson, *supra* note 135.

<sup>154</sup>42 U.S.C. § 2652(a) (1982).

<sup>155</sup>Exec. Order No. 11,060, 27 F.R. 10,925 (1962), reprinted in 42 U.S.C. § 2651 (1976).

<sup>156</sup>The rates for the past five years have been:

	In-Patient Cost	Out-Patient Cost	Source
Nov 1983 - Present	\$ 391	\$ 49	48 Fed. Reg. 50,642 (1983)
Dec 1982 - Nov 1983	\$ 430	\$ 40	47 Fed. Reg. 55,743 (1982)
Jan 1982 - Dec 1982	\$ 406	\$ 40	46 Fed. Reg. 63,158 (1981)
May 1981 - Jan 1982	\$ 336	\$ 33	46 Fed. Reg. 25,738 (1981)
Apr 1980 - May 1981	\$ 254	\$ 26	45 Fed. Reg. 24,293 (1980)
Jun 1979 - Apr 1980	\$ 226	\$ 23	44 Fed. Reg. 32,490 (1979)
Oct 1977 - May 1979	\$ 206	\$ 20	42 Fed. Reg. 54,480 (1977)

<sup>157</sup>*E.g.*, Peterson v. Head Constr. Co., 367 F. Supp. 1072 (D.D.C. 1973); United States v. Jones, 264 F. Supp. 11 (E.D. Va. 1967).

<sup>158</sup>United States v. Jones, 264 F. Supp. 11 (E.D. Va. 1967); Murphy v. Smith, 243 F. Supp. 1006 (E.D.S.C. 1965).

<sup>159</sup>670 F.2d 469 (4th Cir. 1982).

defendant attacked the government rates as unreasonable because they bore no relation to the actual care rendered the injured party; the daily rate was the same whether the patient received major surgery or simple bed care.<sup>160</sup> The Fourth Circuit reviewed the OMB regulations and held that they were not entitled to a presumption of reasonableness because they did not describe the procedure by which the daily rates were determined and the court could not review the rates for arbitrariness or capriciousness.<sup>161</sup> The court would not permit the OMB rates to withstand defendant's evidence that the particular care rendered the injured party would have been substantially less than that charged by the government, if the actual care provided had been the basis of the charge.<sup>162</sup>

Absent a presumption of reasonableness for the OMB rates, it will be extremely difficult for the government to prove its expenses. There are currently no procedures for determining the cost of actual care rendered a patient; cost comparisons and evaluations would become necessary. Fortunately, OMB has revised its regulation prescribing daily rates for medical care. The current regulation describes the procedure used to arrive at these daily rates and it should satisfy the problem facing the Fourth Circuit.<sup>163</sup>

## V. THE CONTRACT RIGHT

As noted above, the Act grants the United States a recovery right in tort only. Over the past several years, however, the government has been able to recover significant sums of money as a third party beneficiary to automobile insurance policies.<sup>164</sup> Initial recoveries were made pursuant to the uninsured motorist provisions of the in-

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<sup>160</sup>*Id.* at 470.

<sup>161</sup>*Id.* at 471-72.

<sup>162</sup>The government care cost \$9,508. It was stipulated that the care would have cost \$5,192.50, if provided by a private hospital which billed only for the care actually given a patient. *Id.* at 470.

<sup>163</sup>See 48 Fed. Reg. 50,642 (1983) (giving the current rates, effective November 1983). The regulation providing the rates from December 1982 to November 1983 also described the procedure used to arrive at the rates, 47 Fed. Reg. 55,743 (1982).

<sup>164</sup>See *supra* note 4.

jured party's insurance contract.<sup>165</sup> These were followed by cases establishing the government's right to recover its medical expenses pursuant to the medical payments provisions of the contract.<sup>166</sup> More recently, the government has been attempting recovery under the no-fault provisions of the insurance policy, although it has achieved mixed results.<sup>167</sup> Before analyzing each of these methods of recovery, however, a brief review of the government's right to recover in contract will be presented.

### A. CONTRACT RECOVERY

While *Standard Oil* stands for the proposition that the government has no right to recover its medical expenses from a third party tortfeasor absent a federal statute authorizing such recovery, the need for a statute authorizing *contractual* recovery has long been denied. In 1818, in *Dugan v. United States*,<sup>168</sup> the Supreme Court rejected the contention that the government could not enforce its rights under a contract without a congressional statute for that purpose.

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<sup>165</sup>The first reported case is *Government Employees Ins. Co. v. United States*, 376 F.2d 836 (4th Cir. 1967). Interestingly, Bernzweig suggested that the government could recover uninsured motorist payments. Bernzweig, *Public Law 87-693: An Analysis And Interpretation Of The Federal Medical Care Recovery Act*, 65 Colum. L. Rev. 1257, 1268 (1964). Bernzweig believed that the United States could recover these benefits pursuant to the Medical Care Recovery Act because uninsured motorist payments were predicated upon the tort liability of the uninsured motorist. This theory was rejected for one suggested by Gotting in *Recovery Of Medical Expenses And The Medical Care Recovery Act*, JAG J. 75 (Dec. 65 - Jan. 66). Gotting noted that the Medical Care Recovery Act created a cause of action only against the tortfeasor, not an insurer, and called for recovery pursuant to the terms of the contract itself. *Id.* at 80.

<sup>166</sup>The first reported case is *United States v. State Farm Mut. Auto. Ins. Co.*, 455 F.2d 789 (10th Cir. 1972). Bernzweig again called for the recovery of medical payments in his article, *supra* note 165, at 1267-68. He only focused, however, on the recovery of medical payments benefits when the injury was the result of tortious conduct. *Id.* Bernzweig felt that recovery was based on the Medical Care Recovery Act which required circumstances of tort liability. The right to recover medical payments pursuant to the contract was suggested by Gotting in his article, *supra* note 165, at 77-79.

<sup>167</sup>The first reported case is *United States Auto. Ass'n. v. Holland*, 283 So.2d 381 (Fla. 1973) (the injured party sued on behalf of the United States). While this case was decided twelve years ago, the no-fault issue has only recently become active. The only article addressing it is an excellent Note, *The Federal Medical Care Recovery Act In No-Fault Automobile Insurance Jurisdictions: Extensions Of The Federal Right Of Reimbursement Against No-Fault Insurers*, 21 B.C.L. Rev. 623 (1980). Currently, two cases are on appeal to the Sixth and Fifth Circuits, concerning recovery of no-fault benefits in Kentucky and Georgia.

<sup>168</sup>16 U.S.(3 Wheat.) 172 (1818). See also *United States v. Tingey*, 30 U.S.(5 Pet.) 115, 127-8 (1831); *United States v. Buford*, 28 U.S.(3 Pet.) 12, 28 (1830).

The Court opined: "[I]t would be strange to deny to [the United States] a right which is secured to every citizen . . . ." <sup>169</sup>

In more recent cases, the government's right to recover pursuant to the contract has been equally sustained. In *Rowley v. United States*, <sup>170</sup> the government was sued for the negligence of one of its drivers. The driver, who was using his own automobile in the course of his employment, had a contract of insurance which insured "any person or organization legally responsible for the use of the automobile . . . for any bodily injury or property damage resulting from the use of the automobile." <sup>171</sup> The contract also noted the driver's occupation as a United States mailman and it expressly stated that use of the vehicle for business purposes was a proper and covered use. <sup>172</sup> Finally, the contract defined the term "insured" as any person using the automobile and "any person or organization legally responsible for the use thereof." <sup>173</sup> The court concluded that, under the terms of the contract, the United States, which was legally responsible for the bodily injury and property damage caused by the vehicle's use, was an insured and the insurer was contractually obligated to pay for the government's liability. <sup>174</sup> This result was upheld in a series of cases <sup>175</sup> and it was only natural that the government should soon attempt to recover its medical expenses pursuant to contracts where it was an insured under the terms of the contract.

## B. UNINSURED MOTORIST PROVISIONS

Uninsured motorist protection grew out of public concern over the problems arising from accidents caused by the negligence of uninsured, financially irresponsible, and hit-and-run drivers. <sup>176</sup> This insurance is designed to provide financial recompense to persons suf-

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<sup>169</sup>16 U.S. at 181.

<sup>170</sup>140 F. Supp. 295 (D. Utah 1956).

<sup>171</sup>*Id.* at 296.

<sup>172</sup>*Id.* at 297.

<sup>173</sup>*Id.*

<sup>174</sup>*Id.* at 298.

<sup>175</sup>*E.g.*, *Government Employees Ins. Co. v. United States*, 349 F.2d 83 (10th Cir. 1965); *McCrary v. United States*, 235 F. Supp. 33 (E.D. Tenn. 1964); *Gahagn v. United States*, 225 F. Supp. 890 (W.D. La. 1964).

<sup>176</sup>Every state has enacted legislation requiring uninsured motorist protection to be offered to insureds on either a mandatory or optional basis. R. Long, *The Law of Liability Insurance* § 24.04 (1983) [hereinafter cited as Long].

fering loss through the negligence of a third party who is unable to respond in damages.<sup>177</sup>

The typical uninsured motorist provision will obligate the insurer to pay the insured that which he would be legally entitled to recover as damages from the operator of an uninsured automobile.<sup>178</sup> The contract will also define the term "insured," often broadly enough to give rise to a claim on behalf of the United States.

In *Government Employees Insurance Co. v. United States*,<sup>179</sup> the court considered the government's right to recover its medical expenses pursuant to the injured party's uninsured motorist coverage. The insurance policy contained the general provision obligating it to pay the insured damages that would have been owed by the tortfeasor.<sup>180</sup> The contract also broadly defined "insured" as: "(a) the named insured and any relative; (b) any other person while occupying an insured automobile; and (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this part applies sustained by an insured under (a) or (b) above."<sup>181</sup> The court reasoned that the United States was entitled to recover its medical expenses from the tortfeasor pursuant to the Act and that it was a "person" and an "insured" within the meaning of the insurance policy.<sup>182</sup> Accordingly, the United States was covered by the express terms of the contract and permitted to recover.

It is important to note that, while the Act gave the United States a cause of action against the tortfeasor, it was only the provisions of the contract which gave the United States a right to recover from the injured party's insurer. The importance of the insurance policy's definitions and coverage was underscored by *United States v. Allstate*.<sup>183</sup> In that case, the insurance policy defined "insured" as only the named insured, his relatives, and persons in the automobile with the insured's permission.<sup>184</sup> The policy did not permit recovery by "any person" suffering damages as in the *Government Employees*

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<sup>177</sup>*Id.* See *id.* at ch. 25 (thoroughly discussing uninsured motorist protection). See also 7 Am. Jur. 2d *Automobile Insurance* § 20-40 (1980). For an in-depth discussion of the government's right to recover uninsured motorist benefits, see Cruden, *Government Recovery: Federal Medical Care Recovery Act, Automobile Insurance and Workmen's Compensation*, 13 Santa Clara L. Rev. 720 (1973).

<sup>178</sup>Long, *supra* note 176, at § 24.04.

<sup>179</sup>376 F.2d 836 (4th Cir. 1967).

<sup>180</sup>*Id.* at 837.

<sup>181</sup>*Id.* (emphasis added).

<sup>182</sup>*Id.*

<sup>183</sup>306 F. Supp. 1214 (N.D. Fla. 1969). See also *Hightower v. Dixie Auto. Ins. Co.*, 247 S.2d 912 (La. App. 1971).

<sup>184</sup>306 F. Supp. at 1215.

case. Because recovery could only be made pursuant to the contract and the contract failed to include the United States, the government was denied reimbursement of its medical expenses.

*Allstate* demonstrates the frailty of the government's position in recovering under the uninsured motorist provisions of a contract. The insurance company can simply write the government out of its policy by not including it within the definition of an "insured." Indeed, it appears possible for the insurance company to use the same definition of insured that was used in *Government Employees* but exclude the United States in its exclusionary clause. In *United States v. Commercial Union Insurance Group*,<sup>185</sup> a district court reviewed a contract containing the broad *Government Employees'* definition of insured. The insurance company argued that the United States, while covered by the definition of insured, was excluded by the policy's provision that the coverage did not apply to any "self-insurer under any workmen's compensation or disability benefits law or any similar law."<sup>186</sup> While the court rejected the contention that this excluded the United States, it strongly implied that the insurance company could have done so if it had more clearly written the exclusionary provision to include the United States.<sup>187</sup>

The recovery attorney should investigate the applicability of uninsured motorist protection in cases involving insolvent tortfeasors and should be prepared to assert a claim thereunder if appropriate. If it appears that the government is excluded from coverage, either by non-inclusion under the terms of the contract or by specific exclusion, the federal attorney should review applicable state law to insure the exclusion is permissible.

### C. MEDICAL PAYMENTS

Because of high medical costs and the delays associated with litigating liability, standard automobile liability insurance policies often contain provisions obligating the insurer to pay for all medical expenses related to injuries sustained by persons occupying the insured car with the owner's permission.<sup>188</sup> This coverage is provided regardless of fault.

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<sup>185</sup>294 F. Supp. 768 (S.D.N.Y. 1969).

<sup>186</sup>*Id.* at 771.

<sup>187</sup>*Id.*

<sup>188</sup>See generally Long, *supra* note 176, at ch. 8.



Unlike the uninsured motorist coverage, the medical payments provisions do not define an "insured" broadly enough to include the United States.<sup>188</sup> Perhaps because of this, the courts<sup>190</sup> have addressed the government's right to recover under these provisions by analyzing the government's right as a third party beneficiary.<sup>191</sup> These "med-pay" provisions generally obligate the insurer "to pay all reasonable expenses incurred within one year from the date of the accident . . . [t]o or for the named insured . . . ."<sup>192</sup> The use of the language "to or for" leads to the conclusion that the insurer is agreeing to pay "for" the medical expenses incurred on behalf of the insured as well as to reimburse the medical expenses incurred by the insured. Under this interpretation, the insurer is obligated to reimburse the United States or another third party if they had incurred the expense of providing care to the injured party. This conclusion is bolstered by the following provision, also commonly found in the med-pay provision of the contract: "the company may pay the injured person or any person or organization rendering the services . . . ."<sup>193</sup> This provision envisions the insurance company making payments directly to a third person or organization that provides care to the injured party. While this payment is arguably at the sole option of the insurer, when combined with the other provision obligating the insurer to pay for the medical expenses incurred "for" the injured party it readily leads to the conclusion that the

<sup>188</sup>"Insured" is more narrowly defined as the one who is the named insured. Cf. 7 Am. Jur. 2d *Automobile Insurance* § 28.7 (1980). But see *United States v. California State Auto. Ass'n*, 530 F.2d 850 (9th Cir. 1976) (where insurance policy contained a broad definition of insured which included the United States).

<sup>189</sup>*United States v. California State Auto. Ass'n*, 530 F.2d 850 (9th Cir. 1976); *United States v. Automobile Club Ins. Co.*, 552 F.2d 1 (5th Cir. 1975).

<sup>190</sup>A contractual obligation is generally limited to the parties to the contract. The contract may, however, specifically or impliedly, name other beneficiaries. See generally 17 Am. Jur. 2d *Contracts* § 294 (1964). Perhaps because the definition of insured in the uninsured motorist provisions clearly includes the United States, none of these cases discuss third party beneficiary law. On the other hand, all of the med-pay cases discuss the third-party beneficiary status of the United States. While all the med-pay cases have apparently used state law to determine the third-party beneficiary status of the United States, the case, *United States v. Nationwide Mut. Insur. Co.*, 499 F.2d 1355 (9th Cir. 1974), provides the most thorough analysis.

<sup>191</sup>*Long*, *supra* note 176, at § 8.05 (emphasis added). See also *United States v. Auto. Club Ins. Co.*, 522 F.2d 1 (5th Cir. 1975); *United States v. United Services Auto. Club*, 431 F.2d 735 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971). Another common provision obligates the insurer to pay medical expenses "incurred by or on behalf of" the insured. *Long*, *supra* note 176 at § 8.03B. See also *United States v. Government Employees Ins. Co.*, 461 F.2d 58 (4th Cir. 1972) (United States entitled to recover under these provisions.).

<sup>192</sup>*Long*, *supra* note 176, at § 8.04 (emphasis added). See also *United States v. Auto. Club Ins. Co.*, 522 F.2d 1 (5th Cir. 1975); *United States v. United Services Auto. Club*, 431 F.2d 735 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

party incurring the medical expenses is entitled to recover those expenses from the insurer.

This conclusion has been consistently applied by the courts in all cases interpreting the medical payments provisions.<sup>194</sup> Thus, in *United States v. Automobile Club Insurance Co.*,<sup>195</sup> the Fifth Circuit reiterated its earlier opinion<sup>196</sup> and joined the Fourth,<sup>197</sup> and Tenth<sup>198</sup> Circuits, as well as many district and state courts,<sup>199</sup> that these provisions "clearly establish the Government as a third party beneficiary."<sup>200</sup> Public policy supports this contractual interpretation. The insurer has charged a premium for providing the medical coverage and, unless it reduces this charge for those entitled to free government care, it will reap the windfall associated with providing, in effect, no coverage at a cost.<sup>201</sup>

As with uninsured motorist protection, it appears possible for the insurance company to specifically exclude the United States from its coverage or to word its provisions in such a way as to preclude the United States from being construed as a third party beneficiary to this contract. While no case has held, the possibility was raised in *United States v. Nationwide Mutual Insurance Co.*,<sup>202</sup> where the court remanded the case for further evaluation of the contract in light of the applicable state third party beneficiary law. The potential for specifically excluding the United States from coverage has also been raised in dictum in several cases.<sup>203</sup>

The recovery attorney should always be alert to the possibility of medical payments coverage. This coverage, unlike uninsured motorist coverage, does not depend on tort liability. Med-pay cover-

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<sup>194</sup>No case has denied the United States the right to recover med-pay insurance. *United States v. Nationwide Mut. Ins. Co.*, 499 F.2d 1355 (9th Cir. 1974), was remanded, however, for further evaluation of the government's status as a third party beneficiary under state law.

<sup>195</sup>522 F.2d 1 (5th Cir. 1975).

<sup>196</sup>*United States v. United States Auto. Ass'n*, 431 F.2d 735 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971).

<sup>197</sup>*United States v. Government Employees Ins. Co.*, 461 F.2d 58 (4th Cir. 1972).

<sup>198</sup>*United States v. State Farm Mutual Auto. Ins. Co.*, 455 F.2d 789 (10th Cir. 1972).

<sup>199</sup>E.g., *United States v. Government Employees Ins. Co.*, 421 F. Supp. 1322 (N.D.N.Y. 1976); *Cook v. Government Employees Ins. Co.*, 223 S.E.2d 33 (S.C. 1976); *Blackburn v. Government Employees Ins. Co.*, 216 S.E.2d 192 (S.C. 1976).

<sup>200</sup>552 F.2d at 3.

<sup>201</sup>See, Cruden, *supra* note 177, at 735-38 for greater discussion on the public policy issue.

<sup>202</sup>499 F.2d 1355 (9th Cir. 1974).

<sup>203</sup>E.g., *United States v. Automobile Club Ins. Co.*, 522 F.2d 1, 5 (5th Cir. 1975); *United States v. Government Employees Ins. Co.*, 421 F. Supp. 1322, 1326 (N.D.N.Y. 1976).

age is available in single and multiple car accidents even when the party receiving government care was at fault. Moreover, med-pay is available as an additional source of revenue when the government's tort cause of action does exist. In such instances, it might be easier to collect the government's expenses from the med-pay insurer and allow the injured party pursue his tort case without government interference.<sup>204</sup> In collateral source states, this would provide an additional recovery to the injured party and thus an incentive for the injured party to cooperate with the government.<sup>205</sup>

As with uninsured motorist coverage, if the recovery attorney is faced with a contract that excludes the United States from coverage, the attorney should review state law to insure it is within public policy.

### D. PUBLIC POLICY AND EXCLUSIONS

One commentator has cautioned against too readily accepting exclusions of the government from uninsured motorist and medical payments coverages.<sup>206</sup> A strong argument can be made that medical payments coverage offered to service members or their dependent without a reduction in the premium charged is deceptive because it purports to obligate the insurer to pay for all automobile accident related medical expenses when, in fact, the insurer is taking a much smaller risk.<sup>207</sup> Similarly, the uninsured motorist protection purports to pay for damages otherwise owed by the financially irresponsible tortfeasor; in fact, the risk taken is less than it seems at first glance.

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<sup>204</sup>The injured party who prefers to collect the med-pay and allow the government to recover from the tortfeasor should be advised that several cases have denied the injured party a recovery of med-pay benefits because he did not personally incur the medical expenses. *E.g.*, *Brackens v. Allstate Ins. Co.*, 339 So.2d 486 (La. 1976); *LeFebvre v. Government Employees Ins. Co.*, 259 A.2d 133 (N.H. 1969).

<sup>205</sup>While the injured party may not be able to collect med-pay benefits, in collateral source states, he or she can recover the cost of medical care from the tortfeasor. If the injured party cooperated with the government in recovering the med-pay, both parties would benefit.

<sup>206</sup>Cruden, *supra* note 177, at 733-38. The author provides an excellent analysis of this issue.

<sup>207</sup>*Id.* at 736. Cruden cites to the Wyoming Insurance Commissioner's rejection of a request by an insurance company to exclude the United States from its med-pay coverage. In analogous cases, the courts have rejected the insurance industry's attempts to exclude the United States from its liability coverage. *United States v. Government Employees Ins. Co.*, 612 F.2d 705 (2d Cir. 1980) (statute did not authorize exclusion); *United States v. Government Employees Ins. Co.*, 409 F. Supp. 986 (E.D. Va. 1976) (statute did not authorize exclusion). *But see* *Government Employees Ins. Co. v. United States*, 400 F.d 172 (10th Cir. 1968) (exclusion permitted).

These reduced risks should have a reduced premium; otherwise the insurer reaps a "windfall." This windfall argument has been recognized by the courts and undoubtedly was persuasive in the holding that the United States was entitled to recover the contractual benefits.<sup>208</sup>

If the recovery attorney is faced with a contract explicitly or implicitly excluding the United States from uninsured motorist or medical payments benefits, the attorney should ascertain if the insured injured party was given a reduced premium for the insurance coverage. If not, the recovery attorney should attempt to persuade the Insurance Commissioner that the exclusion is void as against public policy.

### E. PROCEDURAL CONSIDERATIONS<sup>209</sup>

When the government pursues a contractual rather than tort cause of action, the procedural rights granted by the Medical Care Recovery Act are no longer applicable. Thus, the right to intervene in a contractual suit arises from a local statute or court rule rather than the Act.<sup>210</sup> Also, because it is a contractual cause of action, the three-year federal statute of limitations applicable to the tort actions does not apply.<sup>211</sup> Instead, the six-year statute of limitations for contractual rights will apply.<sup>212</sup> In addition, however, the government's recovery right may be limited by the terms of the contract. Thus, in *United States v. Hartford Accident and Indemnity Co.*,<sup>213</sup> the government's right to recover was held barred because the government did not file its claim within one-year from the date the injuries were sustained as required by the contract.<sup>214</sup> This requirement was a contractual precondition to recover which bound third party beneficiaries to the contract as well as the primary contracting parties.<sup>215</sup>

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<sup>208</sup>E.g., *United States v. Government Employees Ins. Co.*, 461 F.2d 58 (4th Cir. 1972); *United States v. Government Employees Ins. Co.*, 421 F. Supp. 1322 (N.D.N.Y. 1976) (quoting the 4th Circuit *Government Employees* case).

<sup>209</sup>The policy considerations discussed in this section are also applicable to no-fault recoveries. See *infra* text accompanying notes 219-314.

<sup>210</sup>See generally 59 Am. Jur. 2d *Parties* §§ 129-161 (1971).

<sup>211</sup>28 U.S.C. § 2415(b) (1976).

<sup>212</sup>*Id.* Cruden, *supra* note 177, at 729 suggests that the state statute of limitations applies to actions based on contract. However, his suggestion appears to be based on a confusion between a statute of limitations and a contractual or statutory prerequisite to the accrual of a cause of action. See *infra* text accompanying notes 213-15.

<sup>213</sup>460 F.2d 17 (9th Cir.), cert. denied, 409 U.S. 979 (1972).

<sup>214</sup>This provision was required to be included in the contract by California statute, Cal. Ann. Ins. Code § 11580.2 (1971 Pocket Part), 460 F.2d at 18.

<sup>215</sup>*Id.* at 19.

The *Hartford Accident* case demonstrates the need for the recovery attorney to comply with the prerequisites set forth within the contract. As a general rule, these will include a requirement to file a claim in considerably less time than the six-year statute of limitations in which a suit must be brought.

The only apparent exception to the inapplicability of the Medical Care Recovery Act's procedures to contractual recovery arises with the valuation of medical expenses. The OMB rates promulgated pursuant to the President's authority under the Act<sup>216</sup> have been used to determine the value of the care rendered in cases even when the government's claim for reimbursement is contractual in nature.<sup>217</sup> As long as the OMB rates are reasonable, there is little likelihood of challenging this procedure. This is particularly true because the vast majority of contractual claims are limited to fairly small claims of under \$15,000 and the difference between the government's stated cost of care and another hospital's cost may not warrant litigation. In a case involving high coverage and a high claim, however, it seems probable that the applicability of the OMB rates will be challenged if these applications result in a substantially higher claim than would have been made by a private hospital. If successful, the government will be forced to itemize its expenses for medical care or secure cost comparisons and evaluations for the care actually rendered an injured person.<sup>218</sup>

## VI. NO-FAULT

Just as medical payments and uninsured motorist coverage supplement the government's tort recovery right, no-fault coverage can also be a supplement. Because it has frequently been combined with an abolition of tort liability,<sup>219</sup> however, no-fault coverage is often considered only a substitute for, rather than supplement to, the tort recovery right. The extent to which no-fault coverage is a supplement or a substitute depends on the type of no-fault statute involved and the extent to which the statute has abolished tort liability.

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<sup>216</sup>See *supra* text accompanying notes 154-63.

<sup>217</sup>*Cf. United States v. Nationwide Mut. Ins. Co.*, 499 F.2d 1355, 1356 (9th Cir. 1974) (government originally filed its claim under the Medical Care Recovery Act).

<sup>218</sup>Of course, this could be avoided by amending the current Act to make it applicable to all medical expense recoveries.

<sup>219</sup>*E.g.*, N.Y. Ins. Law § 673 (McKinney Supp. 1983) (no right of recovery against tortfeasor, with some exceptions); Pa. Stat. Ann. tit. 40, § 100.9.301 (Purdon Supp. 1983) (tort liability abolished for automobile accidents, with some exceptions).

No-fault statutes fall into three categories: "almost-pure," "moderate," and "add-on."<sup>220</sup> The "add-on" no fault statute is a statutory requirement that medical payments coverage be included in the insurance contract.<sup>221</sup> This type of statute places no limitation on the right to sue in tort<sup>222</sup> and any recovery pursuant to these statutes and the contracts written thereunder should be supplemental to the basic right to recover in tort. Because med-pay coverage is mandatory under these no-fault statutes, if the government is contrived to be a beneficiary thereto, its recoveries should increase significantly. Moreover, if the med-pay coverage is inadequate or if the government is not covered, it can still bring its tort cause of action.

The "modified" and "almost pure" no-fault statutes, on the other hand, provide some abrogation of tort liability.<sup>223</sup> Both types of statutes will provide some exceptions to this abrogation and both will establish a threshold level of damage or injury above which tort liability still exists. The "almost-pure" statute will have a very high threshold<sup>224</sup> while the "modified" statute will have a very low

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<sup>220</sup>For an excellent survey of no-fault insurance, see Note, *No-Fault Automobile Insurance: An Evaluative Survey*, 30 Rutgers L. Rev. 909 (1977). See generally Long, *supra* note 176, at chs. 27, 28.

<sup>221</sup>Note, *supra* note 220, at 927. Six states have "add-on" schemes: Ark. Stat. Ann. §§ 66-4014 to -4021 (1980 & Supp. 1983); Del. Code Ann. tit. 21, § 2118 (Supp. 1982); Md. Ann. Code art. 48A, §§ 538-547 (1979 — Supp. 1983); Or. Rev. Stat. §§ 743.800 to .835 (1983); Tex. Ins. Code Ann. art. 5.06-3 (Vernon 1981). In addition, at least two states require the insurer to provide no-fault benefits at the option of the insured. S.C. Code §§ 56-11-110 to -250 (1977 & Supp. 1983); Va. Code § 38.1-380.1 to -380.2 (Supp. 1983).

<sup>222</sup>Note, *supra* note 220, at 927.

<sup>223</sup>*Id.* at 928, 930. A pure no-fault statute would completely eliminate tort liability. No statute goes this far. *Id.*

<sup>224</sup>*Id.* at 928. The author further classified the modified plans as "high benefit" and "low benefit" because of the significant range of the modified plans. The almost-pure statute will have a very high threshold before tort liability will attach. Michigan has the highest threshold in that there is no monetary limit which will trigger tort liability for pain and suffering; only death, serious disfigurement or serious impairment of a bodily function will suffice. Mich. Stat. Ann. § 24.13135 (Calleghan 1982).



threshold.<sup>225</sup> No matter which type of statute is applicable in a given case, issues arise concerning whether the United States can recover no-fault benefits to reimburse its medical expenses, and whether the United States can still sue in tort.

### A. RECOVERING NO-FAULT BENEFITS

Three theories have emerged concerning the government's right to recover no-fault benefits. The earliest and most expansive was expressed in *United States Automobile Association v. Holland*.<sup>226</sup> In that case, an injured serviceman sought to recover no-fault benefits on his own behalf and, in the case of medical benefits, on behalf of the United States.<sup>227</sup> The court viewed Florida's no-fault law as eliminating tort liability and recognized that application of this statute would also eliminate the government's recovery right.<sup>228</sup> The court, however, deemed the federal recovery right supreme to the state no-fault law and held the government's recovery right could not be eliminated.<sup>229</sup> However, rather than finding the entire no-fault law completely inapplicable to the government's cause of action, the court harmonized the objectives of both the state and federal statutes. The court reasoned that the state no-fault law actually substituted the insurer for the tortfeasor and, accordingly, the government could follow this substitution and recover its medical expenses from the no-fault insurer.<sup>230</sup>

<sup>225</sup>With the exception of Michigan, see *supra* note 224, no-fault statutes which abrogate tort liability have a monetary threshold which triggers liability if the medical expenses exceed it. Generally, a few days in the hospital will generate expenses which surpass the threshold. There are fourteen states which have a "modified" no-fault statute: Colo. Rev. Stat. §§ 10-4-701 to -723 (1974 & Supp. 1983); Conn. Gen. Stat. §§ 38-319 to -351a (West Supp. 1983); Fla. Stat. Ann. §§ 627.730 to .7405 (West 1972 & Supp. 1983); Ga. Code Ann. §§ 33-34-1 to -13 (1982 & Supp. 1983); Haw. Rev. Stat. §§ 294-1 to -41 (1976 & Supp. 1983); Kan. Stat. §§ 40-3101 to -3121 (1981); Ky. Rev. Stat. §§ 304.39-010 to -340 (1981 & Supp. 1982); Mass. Gen. Laws Ann. ch. 90 §§ 34A-340 (West Supp. 1983); Minn. Stat. Ann. §§ 65B.41 to .71 (West Supp. 1984); N.J. Stat. Ann. §§ 39:6A-1 to -20 (West 1973 & Supp. 1983); N.Y. Ins. Law §§ 670-678 (McKinney Supp. 1983); N.D. Cent. Code §§ 26-41-01 to -19 (1978 & Supp. 1983); Pa. Stat. Ann. tit. 40, §§ 10009.101 to .603 (Purdon Supp. 1983); Utah Code Ann. §§ 31-41-1 to -13.4 (1974 & Supp. 1983).

<sup>226</sup>283 So.2d 381 (Fla. App. 1973). For an excellent discussion on the no-fault issue as it relates to the Medical Care Recovery Act, see Note, *The Federal Medical Care Recovery Act In No-Fault Automobile Insurance Jurisdictions: Extension Of The Federal Right Of Reimbursement Against No-Fault Insurers*, 21 B.C.L. Rev. 623 (1980). The note calls for an expansion of the *Holland* rationale.

<sup>227</sup>283 So.2d at 382.

<sup>228</sup>*Id.* at 385.

<sup>229</sup>*Id.*

<sup>230</sup>*Id.*

This result strikes a fair balance between the no-fault acts and the intent of Congress that accident-related medical expenses be recovered. When the Act was passed, no-fault did not exist. Its recent creation should not be permitted to extinguish the basic right of the United States to recover these expenses. A sense of fairness also dictated this result. As the *Holland* court noted:

When appellant issued to appellee the insurance policy involved herein it did so with full knowledge of the fact that appellee was a member of the armed forces of the United States, whose medical expenses for injuries received in an automobile accident would be paid by the Government which under law had a right to claim reimbursement from the tortfeasor . . . to allow appellant to demand and receive from appellee the same insurance premium which it receives from all others not so favorably situated, and then to disclaim liability for the benefits it has agreed to pay because such benefits have been paid by the Government under mandatory requirements of law, would create a windfall in appellant's favor and bring about an unconscionable and inequitable result. This we are not willing to do.<sup>231</sup>

A key aspect about the *Holland* approach is that it does not rely on the specific wording of the no-fault statute. Rather, it views the overall concept of the no-fault statute as substituting the insurer for the tortfeasor. Under this broad view, the United States would be able to recover under any no-fault plan because its cause of action against the tortfeasor would be substituted by a right to recover no-fault benefits from the insurer.

This harmonious interpretation of the no-fault and Medical Care Recovery acts, however, has not been followed elsewhere and has been specifically rejected by some courts.<sup>232</sup> Despite recent urging by a commentator that the *Holland* view presents a proper and equitable harmonization of the acts,<sup>233</sup> there is little reason to

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<sup>231</sup>*Id.*

<sup>232</sup>*Heusle v. National Mut. Ins. Co.*, 628 F.2d 833, 837-38 (3d Cir. 1980); *Sanner v. Government Employees Ins. Co.*, 150 N.J. Super. 488, 494, 376 A.2d 180, 183 (App. Div. 1977) (per curiam), *aff'd per curiam*, 75 N.J. 460, 383 A.2d 429 (1978).

<sup>233</sup>Note, *supra* note 226.

believe this theory will be adopted elsewhere.<sup>234</sup> While the recovery attorney should continue to argue for such harmonizing, he or she should be prepared to fall back to a recovery right based on the specific language of the statute or the contract, the other two theories permitting government recovery.

### 1. Statutory Beneficiary To The Contract

Because no-fault insurance is a creature of statute, the minimum coverage and scope required by the statute is automatically read into the insurance policy.<sup>235</sup> Accordingly, while the contract may not purport to include the government as a beneficiary, a review of the no-fault statute may lead to the conclusion that the government is a beneficiary.

This result occurred in *United States v. Government Employees Insurance Company*.<sup>236</sup> In that case, the injured service member assigned his claim for medical expenses to the government.<sup>237</sup> Despite the assignment, however, the insurance company denied payment to the government. The insurer argued that its policy only obligated it to pay for medical expenses if those expenses were "sustained by an eligible injured person."<sup>238</sup> While the injured serviceman was eligible for no-fault benefits he had not "sustained" any medical expenses. Accordingly, his assignment gave no right to the United States to recover any expenses.<sup>239</sup> On the other hand, the government, while it had incurred the expenses, was not an eligible insured and had no independent right to recover under the contract. The court accepted this argument as it applied to the terms of the contract,<sup>240</sup> but went further. The court noted that the no-fault statute required that all no-fault insurance "shall be construed as if the provisions required . . ." by the no-fault statute "were embodied therein."<sup>241</sup> The statute also required that no-fault benefits

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<sup>234</sup>The last four cases to address the government's right to no-fault benefits have denied recovery. *United States v. Dairyland*, 674 F.2d 750 (8th Cir. 1982); *Heusle v. National Mut. Ins. Co.*, 628 F.2d 833 (3d Cir. 1980); *United States v. Allstate*, No. 81-0493 (W.D. Ky. Oct. 28, 1982), *appeal docketed*, No. 83-5238 (6th Cir. Apr. 21, 1983); *United States v. State Farm*, No. 83-36-COL (M.D. Ga. Sep. 16, 1983), *appealed docketed*, No. 83-8811 (11th Cir. Dec. 21, 1983).

<sup>235</sup>E.g., Colo. Rev. Stat. § 10-4-71(4)(b) (1974); Ga. Code Ann. § 33-34-3 (1982).

<sup>236</sup>449 F. Supp. 68, (E.D.N.Y. 1978), *aff'd*, 605 F.2d 669 (2d Cir. 1979).

<sup>237</sup>439 F. Supp. at 69.

<sup>238</sup>*Id.*

<sup>239</sup>*Id.*

<sup>240</sup>*Id.*

<sup>241</sup>*Id.* at 70 (construing 1973 N.Y. Laws, ch. 13, § 11).

be paid to "persons, . . . for loss arising out of the use or operation" of a motor vehicle.<sup>242</sup> Finally, it defined loss as including medical expenses.<sup>243</sup>

After noting that the no-fault statute did not limit the term "person" to human beings or exclude the government from its broad class of beneficiaries, the court held that the government was a person under the terms of the statute and permitted it to recover its medical expenses from the no-fault insurer.<sup>244</sup>

A more dramatic result occurred in *United States v. Criterion*,<sup>245</sup> where the no-fault insurer explicitly excluded the United States from coverage.<sup>246</sup> The court noted that the no-fault statute required the no-fault insurer to provide specified minimum coverages of insurance.<sup>247</sup> Specifically, the insurer was required to provide compensation "for payment of all reasonable and necessary . . ." medical care provided as a result of a vehicle accident.<sup>248</sup> The statute also stated that the insurer could pay the benefits for medical care directly to the person supplying the medical care.<sup>249</sup> The broad declaration that the insurer was to pay for all medical expenses, combined with the stated option to pay the provider of care, demonstrated a legislative intent that the provider of care was a statutory third-party beneficiary to the no-fault insurance policies written pursuant to the statute.<sup>250</sup> Since the exclusion of the United States was not specifically authorized by the statute, it was void as against public policy.

The approach taken in these cases produced the favorable result that the government could recover under the particular no-fault statutes reviewed. While the courts did not apply the broad policy enunciated in *Holland*, they nevertheless were willing to broadly construe the state statutes to permit recovery by the United States and avoid the outright elimination of the government's recovery right. While it was clear that the courts were influenced by the underlying policy of *Holland*,<sup>251</sup> it was equally clear that the courts felt bound by the wording of the statutes and the legislative intent to

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<sup>242</sup>605 F.2d at 670 (construing N.Y. Ins. Law. § 672(1)(a) (McKinney Supp. 1978)).

<sup>243</sup>605 F.2d at 671 (construing N.Y. Ins. Law § 671(1)(a) (McKinney Supp. 1978)).

<sup>244</sup>596 P.2d 1203 (Colo. 1979).

<sup>245</sup>*Id.* at 1206.

<sup>246</sup>*Id.* at 1205.

<sup>247</sup>*Id.* (construing Colo. Rev. Stat. § 10-4-706(1) (1974)).

<sup>248</sup>596 P.2d at 1205 (construing Colo. Rev. Stat., § 10-4-708(2) (1974)).

<sup>249</sup>596 P.2d at 1205-06.

<sup>251</sup>In *Government Employees*, 605 F.2d at 672, the court favorably cited *Holland*. In *Criterion*, 596 P.2d at 1206, the court cited *Holland* in support of its conclusion.

be gained therefrom.<sup>252</sup> If these did not permit the conclusion that the United States could recover no-fault benefits, then the government would be precluded from recovery. There was no expression that the federal interest could not be expunged as was provided in *Holland*.

Two reported cases have denied the United States' right to recover no-fault benefits.<sup>253</sup> These cases rejected the *Holland* rationale<sup>254</sup> and construed their no-fault statutes and the contracts involved as not permitting the United States to recover no-fault benefits. The Pennsylvania no-fault statute construed in *Heusle v. National Mutual Insurance Company*<sup>255</sup> specifically authorized benefits to only injured parties as opposed to the generic "person" used in the New York statute.<sup>256</sup> The statute did, however, allow the insurer to make payments "to the supplier or provider" of medical services.<sup>257</sup> The government argued that this demonstrated legislative intent that the provider of care was entitled to recover no-fault benefits.<sup>258</sup> The court rejected this position and construed the authorization of payment to arise only if the injured party "would otherwise be responsible" for the medical expenses.<sup>259</sup> Since the medical care was provided at no cost to the injured soldier, the insurer was not obligated to pay. This conclusion was bolstered by another statutory provision precluding health and accident insurers from seeking subrogation against the no-fault insurer which evidenced intent that parties providing benefits beyond no-fault were not entitled to recover from the no-fault insurer.<sup>260</sup>

In *United States v. Dairyland Insurance Company*,<sup>261</sup> the Eighth Circuit concluded that the North Dakota no-fault statute did not make the United States a beneficiary of the no-fault contract. The statute obligated the insurer to pay for loss sustained only by an in-

<sup>252</sup>*Government Employees*, 605 F.2d at 670-71; *Criterion*, 596 P.2d at 1205-06.

<sup>253</sup>*United States v. Dairyland Ins. Co.*, 674 F.2d 750 (8th Cir. 1982); *United States v. Nat'l Mut. Ins. Co.*, 628 F.2d 833 (3d Cir. 1980).

<sup>254</sup>*National Mutual*, 628 F.2d at 837-38 (specifically rejecting the *Holland* rationale); *Dairyland*, 674 F.2d at 751 (impliedly rejecting the *Holland* rationale by citing to the Note, *supra* note 226, on the no-fault issue and rejecting the government's right to recover no-fault benefits).

<sup>255</sup>628 F.2d 833 (3d Cir. 1980).

<sup>256</sup>Pa. Stat. Ann. tit. 40, §§ 1009.201, 1009.103 (Purdon Supp. 1980) (defining "victim").

<sup>257</sup>628 F.2d at 838 (construing Pa. Stat. Ann. tit. 40, § 1009.106(a)(2) (Purdon Supp. 1980)).

<sup>258</sup>628 F.2d at 838-39.

<sup>259</sup>*Id.*

<sup>260</sup>*Id.* (construing Pa. Stat. Ann. tit. 40, § 1009.111(a)(4) (Purdon Supp. 1980)).

<sup>261</sup>674 F.2d 750 (8th Cir. 1982).

jured person "'or his dependent survivors or incurred on his behalf by his spouse, relatives, or guardian.'"<sup>262</sup> The United States was clearly none of these. Moreover, the statute permitted payment to the provider of care only if such care was rendered "for a charge."<sup>263</sup> The United States was deemed not to have provided care for a charge as intended by the statute. As was the case with the Pennsylvania no-fault statute, the North Dakota statute did not permit an interpretation that the United States was intended to be a beneficiary of no-fault contracts.

When attempting recovery of no-fault benefits, the recovery attorney must look to the applicable no-fault statute and ascertain the minimum coverage and scope required in all no-fault contracts. Many statutes will lend themselves to the interpretation that the United States is entitled to benefits as in *Government Employees* and *Criterion*. In those statutes that cannot be so construed there is still the possibility that the court will adopt the public policy approach of *Holland*, or the contract itself may be construed as providing coverage for the government's medical expenses.

## 2. Contractual Beneficiary

While the no-fault statutes impose minimum requirements on the no-fault insurer, they do not preclude the insurer from providing benefits greater than those envisioned by the statute.<sup>264</sup> Accordingly, even if the no-fault statute does not make the United States a beneficiary, the terms of the insurance policy might. This possibility was discussed in *Heusle*<sup>265</sup> and *Dairyland*,<sup>266</sup> but both courts rejected the contention that the contracts provided greater coverage than the no-fault statute.<sup>267</sup> In *United States v. Leonard*,<sup>268</sup> however, the court found the government to be a third party beneficiary

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<sup>262</sup>*Id.* at 752-53 (construing Colo. Rev. Stat. § 26-41-09 (1974)).

<sup>263</sup>674 F.2d at 753 (construing Colo. Rev. Stat. § 26-41-09(1) (1974)).

<sup>264</sup>*E.g.*, Colo. Rev. Stat. § 10-4-710 (1974); Ga. Code Ann. § 33-4-5 (1982).

<sup>265</sup>628 F.2d at 839.

<sup>266</sup>674 F.2d at 751-53.

<sup>267</sup>In *Heusle*, the government was unable to show any contractual provisions evidencing an intent to benefit a third party beyond a provision that gave the insurer the right to pay either the insured or the provider of care for medical expenses incurred as a result of the covered accident. This was deemed insufficient to confer third party beneficiary status on the United States. 628 F.2d at 839. A similar result occurred in *Dairyland*; the option to pay the provider of care was insufficient to create an enforceable obligation to do so. 674 F.2d at 752. The process of evaluating the no-fault contract is identical to evaluating the med-pay or uninsured motorist provisions. See *supra* text accompanying notes 177-205.

<sup>268</sup>448 F. Supp. 99 (W.D.N.Y. 1978).



under the terms of the contract. In *Leonard*, the injured party had attempted to recover no-fault benefits for the medical expenses relating to his injuries even though the government had incurred the expenses.<sup>269</sup> The United States sought a declaratory judgment that it was entitled to recover these benefits.<sup>270</sup> The no-fault policy required the insurer to "pay first party benefits to reimburse for basic economic loss sustained by an eligible injured person on account of personal injuries. . . ."<sup>271</sup> The court construed this language broadly and held that it did not limit the right to reimbursement to the person sustaining the injury.<sup>272</sup> The court stated that "a fair and sensible interpretation is that the right to reimbursement extends to whomever incurs the expense on behalf of the injured person."<sup>273</sup>

While the *Leonard* decision rested on a broad construction of the policy and may not be adopted elsewhere, it nevertheless demonstrates the need for the recovery attorney to review the contract in addition to the statute to determine if the United States can assert its claim as either a statutorily-required beneficiary to the no-fault contract or as a beneficiary under the terms of the contract. Both possibilities should be explored and, if appropriate, advanced as the basis for recovery of no-fault benefits. Underlying any argument that the United States is a beneficiary, however, should be the policy consideration that the *Holland* court advanced, the need to harmonize the goals of both the state and federal statutes. This policy consideration, while not specifically adopted by courts permitting the United States to recover no-fault, appears to be an underlying rationale for permitting recovery.<sup>274</sup>

## B. THE TORT CAUSE OF ACTION

While addressing the government's right to recover no-fault benefits, many courts have stated in dictum that the government's tort cause of action was extinguished by the state no-fault law.<sup>275</sup>

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<sup>269</sup>*Id.* at 100.

<sup>270</sup>*Id.*

<sup>271</sup>*Id.* at 102.

<sup>272</sup>*Id.*

<sup>273</sup>*Id.* The court also examined the no-fault statute and concluded that its decision was consistent therewith. *Id.*

<sup>274</sup>Those cases permitted the United States to receive no-fault benefits cited *Holland* favorably. See *supra* note 251. Those cases denying recovery rejected the *Holland* rationale. See *supra* note 254.

<sup>275</sup>E.g., *United States v. Dairyland Ins. Co.*, 674 F.2d 750 (8th Cir. 1982); *Heusle v. National Mut. Ins. Co.*, 628 F.2d 833 (3d Cir. 1980). See also Note, *supra* note 226.

This has apparently led the recovery attorney to the same conclusion; no case has been brought to challenge such interpretations. In effect, the government has literally given up without a fight and, in states where the government is not entitled to no-fault benefits, has virtually eliminated the government's recoveries.

As noted earlier, not all no-fault statutes purport to abolish the tort cause of action. The "add-on" statute falls into this category.<sup>276</sup> Thus, it is incumbent upon the recovery attorney to review the applicable no-fault law to determine if it has established an "add-on" scheme, or a "modified" or "almost-pure" no-fault system. Even if "modified" or "almost-pure," however, the statute must be analyzed to see to what extent, if at all, it eliminates the government's tort cause of action.

### *1. Scope Of The No-Fault Statute*

At the outset, it should be noted that most, if not all, no-fault statutes make certain exceptions from the broad abolishment of tort liability. Individuals who intentionally injure others are routinely still subject to tort liability.<sup>277</sup> as are manufacturers, designers, and repairers of automobiles.<sup>278</sup> Other no-fault schemes will permit the individual driver to reject the limitation on his or her tort rights and liabilities.<sup>279</sup> The recovery attorney must therefore examine the no-fault statute to determine if the abolishment of tort liability is even applicable to the circumstances of each case.

An even more important exception, however, may be derived from the manner in which the statute abrogates tort liability. Some statutes clearly abolish tort liability with respect to any injury arising out of a motor vehicle accident.<sup>280</sup> Others, however, abolish tort liability only to the extent no-fault benefits are payable therefor.<sup>281</sup> Under the latter-type statute, if the government was not entitled to recover no-fault benefits, there is a strong argument that tort liability for those damages still exists. For example, the Georgia no-fault statute states that "[a]ny person eligible for economic loss

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<sup>276</sup>See *supra* text accompanying notes 220-25.

<sup>277</sup>*E.g.*, Colo. Rev. Stat. § 10-4-712(a) (1974); Pa. Stat. Ann. tit. 40, § 1009.301(a)(3) (Purdon Supp. 1983).

<sup>278</sup>*E.g.*, Pa. Stat. Ann. tit. 40, § 1009-301(a)(2) (Purdon Supp. 1983).

<sup>279</sup>*E.g.*, Ky. Rev. Stat. § 304-39-060(4) (Supp. 1983).

<sup>280</sup>*E.g.*, Pa. Stat. Ann. tit. 40, § 1009.301 (Purdon Supp. 1983) ("Tort Liability is abolished with respect to any injury . . . if such injury arises out of the maintenance or use of a motor vehicle. . . ."); N.D. Cent. Code § 26-41-12 (1978) ("In any action against a secured person to recover damages because of accidental bodily injury . . . the secured person shall be exempt from liability. . . .").

<sup>281</sup>*E.g.*, Ga. Code Ann. § 33-34-9 (1982); Ky. Rev. Stat. § 304-39-060 (Supp. 1982).

benefits . . . is precluded from pleading or recovering in an action for damages against a tortfeasor. . . ."<sup>282</sup> This provision purports to deny recovery in tort only to those persons eligible for no-fault benefits. Accordingly, the government, if denied benefits, should continue to pursue its tort remedy. Similarly, in Kentucky the no-fault statute states that "[t]ort liability . . . is 'abolished' for damages because of bodily injury . . . to the extent the basic reparation benefits are payable therefore."<sup>283</sup> As under the Georgia statute, the government should continue to recover in tort if denied no-fault benefits.

The recovery attorney should examine the manner in which the applicable no-fault statute purports to abolish tort liability. If liability is abrogated only to the extent no-fault benefits are available, the tort remedy should be pursued.

## 2. Threshold Levels

All no-fault statutes limiting tort liability establish threshold levels above which tort liability still exists. The degree of tort liability, however, may vary.<sup>284</sup> Two thresholds are significant. Most, if not all, no-fault schemes, have left intact tort liability for pain and suffering when the injury is serious or the medical expenses exceed a usually small dollar value.<sup>285</sup> Additionally, many no-fault schemes leave intact tort liability for medical expenses when those expenses exceed the available no-fault benefits.<sup>286</sup> In both cases, the government has strong arguments that, once these thresholds are met, its right to recover in tort still exists.

### (a) *Liability for pain and suffering as a trigger for the Government's right to recover medical expenses.*

The Medical Care Recovery Act specifically gives the United States a right to recover its medical expenses from a third party whenever that third party injures a person who is authorized care at government expense "under circumstances creating a tort liability upon that third person . . . to pay damages therefor. . . ."<sup>287</sup> There is no requirement that the tortfeasor be liable for medical care, only that

<sup>282</sup>Ga. Code Ann. § 33-34-9 (1982).

<sup>283</sup>Ky. Rev. Stat. § 304.39-060 (Supp. 1982).

<sup>284</sup>Note, *supra* note 220, at 928-31.

<sup>285</sup>E.g., N.Y. Ins. Law § 673(1) (McKinney Supp. 1983-84); Pa. Stat. Ann. tit. 40, § 301(a)(5) (Purdon Supp. 1983).

<sup>286</sup>E.g., Colo. Rev. Stat. § 10-4-716(f)(2) (1974); N.Y. Ins. Law § 673(2) (McKinney Supp. 1983-84).

<sup>287</sup>42 U.S.C. § 2651 (1976) (emphasis added).

he be liable for damages to the injured party. Accordingly, once the third party is held liable for *any* damages as a result of causing personal injury to another, the government arguably has a federal statutory right to recover its medical expenses for providing care to that injured person.

This interpretation was adopted in *Hildebrandt v. Kalteux*.<sup>288</sup> This case involved the New York no-fault law which broadly eliminated tort liability for pain and suffering for personal injury arising out of negligence except in cases of serious injury which was defined as, *inter alia*, death, dismemberment, and serious disfigurement.<sup>289</sup> It also eliminated tort liability for medical expenses unless they exceeded \$50,000.<sup>290</sup> The Hildebrandts brought suit against Kalteux for their pain and suffering associated with their "serious injury." No claim was made for medical expenses, since they did not exceed \$50,000.<sup>291</sup> The United States, however, intervened seeking recovery of its medical expenses, even though they were less than \$50,000.

Defendants argued that, since the no-fault law had eliminated their liability to the Hildebrandts for medical expenses below \$50,000, they were not liable to the United States.<sup>292</sup> The court rejected this contention and held that the New York no-fault law's creation of tort liability for personal injury, even if limited to pain and suffering, was sufficient to trigger the government's cause of action under the Act.<sup>293</sup> The no-fault law gave "rise to a case where 'a person . . . is injured . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor. . . .'"<sup>294</sup> and this gave rise to the government's right to recovery its medical expenses.

This case not only adopts a fair approach toward the government's tort cause of action, but also represents a literal interpretation of the Act as applied to the state law. Significantly, it demonstrates the real possibility that the government's cause of action has not been eliminated by the no-fault statutes. Any statute that permits a cause of action for pain and suffering when a specified threshold has been

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<sup>288</sup>98 Misc.2d 1062, 415 N.Y.S.2d 383 (Sup. Ct. Albany County 1979).

<sup>289</sup>*Id.* at 1065, 415 N.Y.S.2d at 386 (construing N.Y. Ins. Law § 673 (McKinney Supp. 1978)).

<sup>290</sup>*Id.*

<sup>291</sup>Although the specific cost of the medical care is never mentioned, one may infer from the opinion that it was less than \$50,000.

<sup>292</sup>98 Misc.2d at 1065, 415 N.Y.S.2d at 386.

<sup>293</sup>*Id.*

<sup>294</sup>*Id.*

met should give rise to the government's cause of action even if the statute eliminates the injured party's right to recover medical expenses. Some examples will be helpful. In Pennsylvania, where the government has been denied no-fault benefits,<sup>295</sup> tort liability still exists for pain and suffering if the accident results in "death or serious and permanent injury . . ." or if the medical expenses exceed \$750.00.<sup>296</sup> Tort liability to the injured party for the medical expenses has been abolished; these are covered by no-fault. Nevertheless, using the *Kalteux* rationale, any care requiring more than two days<sup>297</sup> in the military hospital will give rise to tort liability for pain and suffering. Once this tort liability exists, the government's right to recovery its medical expenses should also be triggered. Similarly, in North Dakota, tort liability for pain and suffering arising from personal injury still exists if there is serious injury which is defined as "death, dismemberment, serious and permanent disfigurement or disability beyond sixty days, or medical expenses in excess of one thousand dollars."<sup>298</sup> Thus, after three days of federal medical care,<sup>299</sup> a tort cause of action will accrue for pain and suffering; it should also accrue for the government's medical expenses. Finally, in New Jersey, where the United States has been unable to recover no-fault benefits, tort liability for personal injury still exists if the injured party sustains death, permanent disability or loss of a bodily function or body member.<sup>300</sup> Moreover, liability continues to exist if medical expenses exceed \$200.00.<sup>301</sup> Accordingly, in every case involving in-patient care,<sup>302</sup> the government's tort cause of action should still exist despite the fact liability to the injured party for medical expenses has been abrogated. This analysis comports with other applications of the Medical Care Recovery Act. For example, in states which do not have the collateral source doctrine, the tortfeasor is not liable to the injured party for medical expenses paid by a third party. Yet, under the Act, the government has a cause of action to recover its medical expenses from the tortfeasor.<sup>303</sup> Tort liability for the personal injury existed and gave rise to the govern-

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<sup>295</sup>*Heusle*, 628 F.2d at 833.

<sup>296</sup>Pa. Stat. Ann. tit. 40, § 301(a)(5) (Purdon Supp. 1983).

<sup>297</sup>At the current rate of \$391 per day, the \$750 threshold would be exceeded after two days care. See *supra* note 156.

<sup>298</sup>N.D. Cent. Code §§ 26-41-03(18), 26-41-12 (1978 & Supp. 1983).

<sup>299</sup>At the current rate of \$391 per day, the \$1,000 threshold would be exceeded after three days care. See *supra* note 156.

<sup>300</sup>N.J. Stat. Ann. § 39:6A-8 (West 1983).

<sup>301</sup>*Id.*

<sup>302</sup>At the current rate of \$391 per day, the \$200 threshold would be exceeded after only one day of care. See *supra* note 156.

<sup>303</sup>See *supra* notes 40 & 57 and accompanying text.

ment's federal cause of action for its medical expenses, a cause of action dependent only on the existence of tort liability for personal injury not necessarily tort liability for medical expenses.

*(b) Liability specifically for medical expenses.*

In addition to retaining tort liability for pain and suffering once a specified threshold has been reached, the no-fault statute may also retain tort liability specifically for medical expenses once the no-fault benefits covering these expenses have been exhausted. North Dakota's statute, for example, exempts a secured person from liability for medical expenses only to the extent that the basic no-fault benefits of \$15,000 are paid.<sup>304</sup> Once these benefits have been depleted, the tortfeasor is again liable for unpaid medical bills. Similarly, in Kentucky, tort liability for medical expenses accrues when the no-fault benefits of \$10,000 are exhausted.<sup>305</sup> Under no-fault schemes such as these, the government should be able to recover its medical expenses from the tortfeasor whenever the medical costs have exceeded no-fault benefits.

*3. Tort And No-Fault Interacting*

In states where the government can collect no-fault benefits, and those benefits are limited, the recovery attorney should not be satisfied to collect only the no-fault benefits. In Colorado, for example, no-fault benefits total only \$25,000.<sup>306</sup> Medical expenses in excess of this are not paid by the no-fault insurer; however, tort liability still exists for the excess.<sup>307</sup> The government should seek to collect the no-fault benefits and, if appropriate, bring a tort suit for the remainder. Similar action should occur in New York, where no-fault benefits are limited to \$50,000,<sup>308</sup> and Florida, where benefits are only \$10,000.<sup>309</sup>

### C. CHAMPUS

To date, there has been no differentiation in the no-fault cases between care provided in the military hospital and care provided by the Civilian Health and Medical Program of the Uniformed Services

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<sup>304</sup>Ky. Rev. Stat. §§ 304.39-020, 304.39-060(2)(a) (Supp. 1983).

<sup>305</sup>N.D. Cent. Code §§ 26-41-03(2), 26-41-12(2) (1978 & Supp. 1983).

<sup>306</sup>Colo. Rev. Stat. § 10-4-706(1)(b) (1974).

<sup>307</sup>*Id.* at § 10-4-716(2).

<sup>308</sup>N.Y. Ins. Law § 671(1) (McKinney Supp. 1983).

<sup>309</sup>Fla. Stat. Ann. § 627.736(1) (West 1972 & Supp. 1983).



(CHAMPUS). Technically, however, there is a substantial difference. When care is provided in the military hospital, the patient incurs no liability for the cost of that care. This lack of liability releases the no-fault insurer from any obligation to "reimburse" the patient. When care is provided under CHAMPUS, however, the patient is personally liable for the cost of care. CHAMPUS, like the no-fault insurer, has merely agreed to assume this liability. The issue then becomes one of priorities and regulations make collection of hospital expenses in all automobile accident cases the responsibility of the recovery attorney.<sup>310</sup> If the injured party elects to file a claim with CHAMPUS instead of the no-fault insurer,<sup>311</sup> CHAMPUS will pay the bill and, in cases appearing to be the result of an automobile accident, forward it to the recovery attorney for collection.<sup>312</sup> If tort liability exists, the attorney sues to recover these costs. If no-fault benefits are available, the attorney will collect them. If tort liability is abolished or does not exist or if no-fault benefits are not available, however, the government will be unable to reclaim the cost of care.

A simple change in CHAMPUS regulations would correct this situation. CHAMPUS should assume initial responsibility for recovering medical expenses in auto-accident cases. If no-fault insurance exists, CHAMPUS should deny payment until all no-fault benefits have been paid. This would merely be an extension of CHAMPUS' current second payor status policy pursuant to which CHAMPUS pays only after all other applicable insurance has been paid.<sup>313</sup> If there is no no-fault insurance or if no-fault benefits have been exhausted, CHAMPUS should reimburse the injured party and, if there appears to be tort liability, forward the case to the recovery attorney for further action.

## VII. WORKER'S COMPENSATION

While the significance of worker's compensation benefits<sup>314</sup> to the total DOD recovery program is unknown, a recent General Accounting Office study estimated that government was recovering only

<sup>310</sup>Dept. of Defense, Reg. No. 6010.8-R. Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), ch. 9, para. F (January 10, 1977) (C. 7, June 30, 1981) [hereinafter cited as CHAMPUS].

<sup>311</sup>The injured party could make this election for a number of personal reasons, including a general preference for using CHAMPUS or a desire to avoid notifying his insurer of an accident for fear of increased premiums.

<sup>312</sup>CHAMPUS, ch. 9.

<sup>313</sup>*Id.* at ch. 8.

<sup>314</sup>Dependents, retired personnel, and soldiers having second jobs would be eligible for worker's compensation benefits if injured on a nongovernment job.

one-third of its potential worker's compensation claims.<sup>315</sup> In response to that study and recent legislation permitting contracting out of collection services,<sup>316</sup> DOD is experimenting with a program in California. A private collection agency has been contracted to identify and recovery all medical expenses covered by worker's compensation benefits.<sup>317</sup> When the program has been completed, the government should have a better understanding of the significance of these recoveries and the benefits of contracting out the recovery effort in all states. Until then, the recovery attorney should understand the elements of worker's compensation and its applicability to DOD medical care recovery efforts.<sup>318</sup>

### A. THE BASIC RECOVERY RIGHT— STATUTE NOT CONTRACT

Worker's compensation statutes broadly eliminate tort liability of the employer to the employee for work-related injuries.<sup>319</sup> While either employer or employee can often elect not to be covered by the worker's compensation statute,<sup>320</sup> there is no evidence that this is commonplace. Accordingly, the government generally has no cause

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<sup>315</sup>United States General Accounting Office, *Stronger VA and DOD Actions Need to Recover Costs of Medical Services Provided to Persons With Work-Related Injuries or Illnesses* (GAO/HRD-82-49), at 5 (June 4, 1982). In addition, only 12 percent of the cost of care in claims asserted was actually recovered. In 1981 the Air Force recovered about \$331,000 in worker's compensation benefits. *Id.* at 3. The Army and Navy did not keep statistics on the amount of recovery attributed to worker's compensation.

<sup>316</sup>31 U.S.C.A. § 952(f)(1) (West Supp. 1983).

<sup>317</sup>The Air Force has been tasked with the responsibility for handling the DOD test program. It will last one year.

<sup>318</sup>For a complete analysis of recovering worker's compensation benefits see Cruden, *supra* note 177, at 738-54. Cruden was the first to fully discuss the problems associated with this type of recovery. For the DOD attorney, little has changed since then. Surprisingly, the Veterans' Administration (VA) has sought and secured recent legislation specifically authorizing their recovery of worker's compensation benefits. This bill also permits recovery of no-fault benefits and benefits provided to persons injured as a result of a crime. 38 U.S.C.A. § 629 (West. Supp. 1983). At one point, the VA attempted to have the legislation permit recovery of personal health insurance benefits, but this was deferred because the cost of health care to the individual is directly related to the number of claims that he or she presents to the insurer. Thus, recovery by the VA would result in higher premiums to the veteran. 1980 U.S. Code Cong. & Ad. News 2463, 2540-54. The legislative history fails to discuss why this Amendment was not made applicable to all government agencies. 1981 U.S. Code Cong. & Ad. News 1685, 1692-96. A bill is currently pending before Congress which would amend the Medical Care Recovery Act to permit the recovery of no-fault benefits in addition to the right to recover in tort. H.R. 4666, 98th Cong., 2d Sess. (1984). There is no provision to permit recovery under worker's compensation. *Id.*

<sup>319</sup>See generally A. Larson, *Law of Workmen's Compensation* §§ 50.40-56.35 (1967).

<sup>320</sup>E.g., Fla. Stat. Ann. § 440.05 (1981); Va. Code § 65-1.25 (1980).

of action against the employer when it provides medical care to an employee injured on the job.<sup>321</sup> Unlike no-fault automobile insurance laws which substitute insurance for the curtailment of tort liability and rights, worker's compensation laws impose a statutory duty upon the employer to provide compensation and medical care for work-related injuries. The government's cause of action, then, arises directly from this duty, rather than from a contract, as with no-fault insurance.

The New Jersey statute, for example, requires the employer to furnish "the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker. . . ."<sup>322</sup> In addition, the statute specifically permits payment of worker's benefits to third parties who pay for the necessary care.<sup>323</sup> Pursuant to these provisions, the Superior Court of New Jersey has held that the United States could recover its medical expenses from the employer.<sup>324</sup> Similarly, in Virginia, the State Industrial Commission has interpreted the worker's compensation statute to impose a duty upon the employer to pay for medical care rendered an injured employee.<sup>325</sup>

## B. STATUTORY PREREQUISITES

Assuming that the injury is one covered by the worker's compensation statute,<sup>326</sup> there are still steps that must be followed before the government can claim benefits. The employee generally must give notice to the employer before seeking care from the govern-

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<sup>321</sup>Of course, to the extent the employer is tortiously liable for any injuries the government would have a tort cause of action for its medical expenses under the Medical Care Recovery Act. The recovery attorney should review the applicable Worker's Compensation Act to determine its general coverage. Specific exemptions are often provided. *E.g.*, Fla. Stat. Ann. § 440.02 (1981); Va. Code § 65.1-4 (1980 & Supp. 1983).

<sup>322</sup>N.J. Stat. Ann. § 34:15-15 (West 1959 & Supp. 1983).

<sup>323</sup>*Id.*

<sup>324</sup>*Stafford v. Pabco Prod., Inc.*, 147 A.2d 286 (N.J. Super. 1958).

<sup>325</sup>Virginia Industrial Commission, Claim No. 637-625 (Sep. 18, 1982), reprinted in Dept. of the Army Newsletter, SUBJECT: *Medical Care Recovery Program, Chapter 5, AR 27-40*, Newsletter No. 6, Incl. 1, (December 23, 1982), filed in the Office of The Judge Advocate General, U.S. Army, Litigation Division, Tort Branch.

<sup>326</sup>Three basic requirements must be met. The injured party must be an "employee" within the definition provided by the worker's compensation statute, and the employer be within the definition of "employer", the injury or disease must be covered by the statute, and the disability must arise out of the course of employment. *See Cruden, supra* note 177, at 741. *See also* A. Larson, *Law of Workmen's Compensation* §§ 37.00-40.60. (1967).

ment.<sup>327</sup> This is required to give the employer the first right to provide the care or to select the provider of care. Only if the employer refuses to provide the care or the care is required because of an emergency can the employee seek his or her own care. If the employer consents to care being provided at the employee's option, he or she can freely select the provider of care.<sup>328</sup> If the employee does seek government care and has complied with the notice requirements of the worker's compensation statute, the government must insure that it or the employee files a claim within the state statutory time limit.<sup>329</sup> Since the government's cause of action is based strictly on the statutorily imposed duty on the employee, its right to recover is bound by statutory limitations such as the notice requirement and the state statute of limitations.

These prerequisites pose differing burdens on the recovery attorney. Since the injured party has an entitlement to free federal medical care, he or she may elect this option without advising the employer of the work-related injury. This failure of notice may invalidate any claim for medical expenses related to that injury. The recovery attorney can do little in this event. On the other hand, the timely filing of the claim is the responsibility of the attorney, who must be knowledgeable of where and when to file. Because the time period for filing a claim may be very short,<sup>330</sup> it is incumbent upon the attorney to be prepared to expeditiously file worker's compensation claims.

## VII. CONCLUSION

The attorney responsible for medical care recovery must develop expertise in a broad array of statutory and common law. He or she must be ever cognizant of the interplay between the various bases of recovery which often makes that recovery exclusive under one theory and supplemental under another. Finally, while the attorney should always seek easier and more fruitful means of recovery such as no-fault, he or she should be prepared to return to the basic tort cause of action and the independent right of the government to collect its medical expenses.

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<sup>327</sup>See Cruden, *supra* note 177, at 743-45.

<sup>328</sup>*Id.*

<sup>329</sup>*Id.* at 747-48.

<sup>330</sup>*E.g.*, Alaska requires notice of all claims for medical treatment be given to the employer and the worker's compensation board within 20 days following the first treatment. Alaska Stat. § 23.30.095 (1981).

## THE RIGHT OF FEDERAL EMPLOYEES TO SUE THEIR SUPERVISORS FOR INJURIES CONSEQUENT UPON CONSTITUTIONAL VIOLATIONS

by Lieutenant Commander Patrick W. Kelley\*

### I. INTRODUCTION

Charles Guiteau was an odd individual. Prior to July 1881, he had been a lawyer, an insurance salesman, and an evangelist, and had dabbled in politics. He had become determined to be appointed to the American consul to Paris. His qualifications, however, proved to be less than adequate, and his repeated entreaties to then Secretary of State James G. Blaine and President James A. Garfield proved unavailing. So persistent were Guiteau's pleas, however, that Garfield barred him from the White House. This proved to be a fateful decision.

As President Garfield and members of his cabinet set out the morning of July 2, 1881 for commencement exercises at Williams College, Guiteau approached, pulled a pistol, and fired twice at the President. Both bullets found their mark. The first inflicted only a superficial wound, but the second lodged in the President's back. Garfield lingered throughout the summer but died on September 19, 1881.<sup>1</sup> Although Guiteau's act was the product of an unstable mind that believed that he was "God's agent" for killing Garfield,<sup>2</sup> the President's death was popularly "laid at the door of the spoils system."<sup>3</sup>

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\*Judge Advocate General's Corps, United States Navy. Currently assigned as Head, Labor and Employment Law Division, Office of the Navy Judge Advocate General, 1984 to date. Formerly assigned as Instructor, Naval Justice School, Newport, Rhode Island, 1981-83; Head, Administrative and Civil Law Division, Trial Counsel, Naval Legal Services Office, Yokosuka, Japan, 1977-81; Staff Judge Advocate, Patrol Wings, U.S. Pacific Fleet, 1975-77; Station Judge Advocate, Naval Air Station, Moffit Field, California, 1974-75. LL.M., University of Pennsylvania, 1984; J.D., Duke University, 1973; B.S., Michigan State University, 1970. M.B.A. candidate, School of Government and Business, The George Washington University. Member of the bars of the State of North Carolina, the United States Court of Military Appeals, and the United States Supreme Court.

<sup>1</sup>R. Donovan, *The Assassins* 14-62 (1955).

<sup>2</sup>A. Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Movement, 1865-1883*, at 209 (1968).

<sup>3</sup>H. Kaufman, *The Growth of the Federal Personnel System in the Federal Government Service* 35 (1965).

The assassination was the catalyst that resulted in the reform of the federal civil service:

This tragic event accomplished overnight what the reformers had been striving for two decades to do: it aroused the country against the spoils system. Political appointments and removals were denounced in press and pulpit, and, in the congressional elections of 1882, in the voting booths. Congress had dawdled over legislation drafted by . . . the reform movement, but when it reconvened in the last months of 1882, it had been forewarned by the defeat of some congressmen in the fall elections, largely on the basis of their stands on civil service revision, that action was necessary. Hesitation ended: on January 16, 1883, President Chester A. Arthur signed into law the Civil Service Act.<sup>4</sup>

Thus, "Garfield dead proved more valuable to reformers than Garfield alive,"<sup>5</sup> and the policy inspired by his demise soon became law. The Civil Service Act of 1883<sup>6</sup> "still provides the legal foundation for the modern civil service, and has had a continuing influence on the development of the public employment relationship."<sup>7</sup> This relationship has undergone many changes since Garfield's time, but the Civil Service Act in its successive forms have given it its definition and content. As will be seen, the extent of the Act's influence upon that relationship is so pervasive that even potential rights of action based on the Constitution of the United States are inextricably linked to and governed by it.<sup>8</sup>

The Act's importance is also demonstrated by the number of employees it governs. It can be ascertained that, at the start of President Washington's administration, there were about 350 employees on the federal payroll.<sup>9</sup> In Garfield's day, the number had grown to approximately 131,200.<sup>10</sup> Today, there are well over two and one-half million federal employees.<sup>11</sup> The federal public service has increased in size far more rapidly than the general population:

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<sup>4</sup>*Id.* at 35.

<sup>5</sup>Hoogenboom, *supra* note 2, at 212.

<sup>6</sup>22 Stat. 403 (1883) (commonly known as the Pendleton Act).

<sup>7</sup>D. Rosenbloom, *Federal Service and the Constitution* 81 (1971).

<sup>8</sup>*See* *Bush v. Lucas*, 103 S. Ct. 2404 (1983).

<sup>9</sup>Kaufman, *supra* note 3, at 8.

<sup>10</sup>*Id.* at 41.

<sup>11</sup>*Id.* at 8.



As late as 1861, the year of the start of the Civil War, the total civil service consisted of 49,000 employees (less than two-tenths of one percent of the population. . .), and it comprised only 208,000 at the turn of the century ( . . . still less than three-tenths of one percent). In the twentieth century, however, federal employment increased more rapidly—it had reached 435,000 when World War I broke out; 515,000 in 1923; 572,000 in 1933; and 920,000 in 1939, when it constituted seven-tenths of one percent of the population of 130 million. Then the number of civil servants shot upwards under the impact of World War II; by war's end in 1945, it stood at 3-3/4 million. The figure declined with the cessation of combat, but government employment was never again to fall back to the pre-World War II levels.<sup>12</sup>

Just as the number of federal civil employees has expanded, so, too, has the percentage of those employees covered by the Civil Service Act. In 1884: "The Act placed about 10 percent of the total number of positions in the competitive or classified service. Since that time several extensions and exclusions have been made by executive order and act of Congress. Since 1919, at least 70 percent, and since 1947 at least 80 percent, have generally been in the classified service."<sup>13</sup> By 1963, the figure had risen to 85.6 percent.<sup>14</sup> Although that figure may seem rather high, it has been estimated that as many as 95 percent<sup>15</sup> of all federal civilian employees are governed to one degree or another by the Civil Service Reform Act of 1978,<sup>16</sup> the modern descendant of the act passed soon after Garfield's death.

Given this pervasive coverage and scope, an understanding of the organization of the federal civil service is necessary to the resolution of any federal employment issue. Essentially, the original civil service laws were designed to decrease, to the extent possible, the influence of politics upon federal employment practices and, simultaneously, to increase the efficiency of federal employees:

The bill has for its foundation the simple and single idea that the offices of the Government are trusts for the people; that the performance of the duties of those offices is

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<sup>12</sup>*Id.*

<sup>13</sup>Rosenbloom, *supra* note 7, at 83.

<sup>14</sup>Kaufman, *supra* note 3, at 43.

<sup>15</sup>Encyclopedia Americana 780 (1980).

<sup>16</sup>Civil Service Reform Act of 1978, 92 Stat. 1134.

to be in the inteest of the people; that there is no excuse for the being of one office or the paying of one salary except that it is in the highest practicable degree necessary for the welfare of the people; that every superfluous office-holder should be cut off; that every incompetent office-holder should be dismissed; that the employment of two where one will suffice is robbery; that salaries so large that they can submit to the extortion, the forced payment, of 2 or 10 percent (to political campaigns) are excessive and ought to be diminished . . . . If it be true that offices are trusts for the people, then it is also true that the offices should be filled by those who can perform and discharge the duties in the best possible way.<sup>17</sup>

While these concerns have remained paramount, additional factors have arisen:

Events . . . highlighted some of the problems of the Federal governmental structure with respect to employment practices, general organization and powers of agencies and departments, and administrative procedures. Governmental secrecy and wrong-doings of public officers and employees showed the need for more open government and higher standards of conduct for officials. Periodic recession and inflation evidenced the necessity of greater and more equitable access to government employment and continual revisions of Federal job classifications, pay schedules and benefits.<sup>18</sup>

Congress' current respone to these concerns is embodied in Title 5 of the United States Code,<sup>19</sup> wherein, "the laws relating to the organization of the Government of the United States and to its civilian officers and employees, generally are revised, codified and enacted. . . ."<sup>20</sup> Part III of Title 5<sup>21</sup> deals with "Employees." Subpart A<sup>22</sup> is concerned with general organization and definitions, Subpart B<sup>23</sup> with employment and retention matters; Subpart C<sup>24</sup> with employee performance; Subpart D<sup>25</sup> with pay and allowances; Sub-

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<sup>17</sup>14 Cong. Rec. 204 (1882).

<sup>18</sup>5 U.S.C.A. vi explanation.

<sup>19</sup>Pub. L. No. 89-554, § 1, 80 Stat. 378 (1966).

<sup>20</sup>*Id.*

<sup>21</sup>5 U.S.C. §§ 2101-8901 (1982).

<sup>22</sup>*Id.* §§ 2101-2901.

<sup>23</sup>*Id.* §§ 3101-3501.

<sup>24</sup>*Id.* §§ 4101-4501.

<sup>25</sup>*Id.* §§ 5101-5901.

part E<sup>26</sup> with attendance and leave; Subpart F<sup>27</sup> with employee relations, and, lastly, Subpart G<sup>28</sup> with insurance and annuities. Section 2101 defines the "civil service" as "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States,"<sup>29</sup> except certain positions in the military services, the Public Health Service, and the National Oceanic and Atmospheric Administration. The 1978 revision<sup>30</sup> added section 2102a,<sup>31</sup> which created the "Senior Executive Service," which in turn is defined by section 3132(a)(2) as "any position in an agency which is in GS-16, 17, or 18 of the General Schedule or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate . . ." and whose incumbent exercises management functions.<sup>32</sup>

Further delineation is made in sections 2102<sup>33</sup> and 2103.<sup>34</sup> The former defines the "competitive service" as "all civil service positions in the executive branch" except specifically excepted positions, positions to which appointments are made with the advice and consent of the Senate, and positions in the Senior Executive Service.<sup>35</sup> The latter defines the "excepted service"<sup>36</sup> as "those civil service positions which are not in the competitive service."<sup>37</sup> As noted previously, most federal employees fall into the "competitive service" category. The significance of the classification is found throughout the remainder of the Title and governs almost every aspect of the employment relationship. For example, section 3304(b)<sup>38</sup> provides: "An individual may be appointed in the competitive service only if he has passed an examination or is specifically

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<sup>26</sup>*Id.* §§ 6101-6301.

<sup>27</sup>*Id.* §§ 7101-7901.

<sup>28</sup>*Id.* §§ 8101-8901.

<sup>29</sup>*Id.* § 2101.

<sup>30</sup>Pub. L. No. 95-454, tit. IV, § 401(a), 92 Stat. 1154 (1978).

<sup>31</sup>5 U.S.C. § 2101a (1982).

<sup>32</sup>*Id.* § 3132(a)(2).

<sup>33</sup>*Id.* § 2102.

<sup>34</sup>*Id.* § 2103.

<sup>35</sup>*Id.* § 2102.

<sup>36</sup>The term "unclassified civil service" means "excepted service." *Id.* § 2103.

<sup>37</sup>*Id.* § 2103.

<sup>38</sup>*Id.* § 3304(b).

excepted from examination. . . ."<sup>39</sup> Positions are divided for pay purposes into 18 grades of "difficulty and responsibility"<sup>40</sup> and "each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Office of Personnel Management. . . ."<sup>41</sup> Sections 7501 through 7543<sup>42</sup> deal with disciplinary matters, and will be discussed in greater detail below. The law is complex:

Question: What has 21 feet and 85 boxes and makes you want to pull your hair out?

Answer: A chart of the procedure for dismissing one Government clerk for being late or absent from work all the time.

Looking like a diagram of the circuitry for an intercontinental ballistic missile, its 21 feet (one foot for each month the process took) of boxes, triangles and zigzagging lines chronicle the memos, warnings, suspensions and conferences needed to dismiss one lowly Federal employee.<sup>43</sup>

The unwieldy nature of the system was one reason that the law was amended in 1978:

The complex rules and procedures have, with their resultant delays and paperwork, undermined confidence in the merit system. Many managers and personnel officers complain that the existing procedures intended to assure merit and protect employees from arbitrary management actions have too often become the refuge of the incompetent employee.<sup>44</sup>

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<sup>39</sup>Whether the goal of merit hiring is achieved is an entirely separate question:

The nature of testing and qualification requirements for higher grades enables political or personal influence to be effective, for at many high-level positions, there are no written examinations. Rather, examinations amount to questionnaires listing education and experience. . . . While standards are used in determining how particular experience must be scored, the agency may draft flexible qualifications. It may ask for selection certification or name certification. . . . Thus it is possible to tailor a job to fit the individual. . . . Said one personnel officer, "Let me work on the SF171 [the position qualification form] and let me advise the applicant on completing the SF 51 [personal history form] and I can qualify an orangutan for any job."

R. Vaughn, *The Spoiled System: A Call for Civil Service Reform* 135 (1975).

<sup>40</sup>5 U.S.C. § 5104 (1982).

<sup>41</sup>*Id.* § 5107.

<sup>42</sup>*Id.* §§ 7501-7543.

<sup>43</sup>N.Y. Times, Feb. 22, 1978, § 2, at 1, col. 1.

<sup>44</sup>S. Rep. No. 969, 95th Cong., 2d Sess. 3, 9-10 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2725, 2731-32.

The amendment replaced the Civil Service Commission, with two new agencies: the Office of Personnel Management and the Merit Systems Protection Board.<sup>45</sup> The Office of Personnel Management is primarily responsible for position classification duties, training, productivity programs, examinations and the issuance of related regulations.<sup>46</sup> The Merit Systems Protection Board took over the adjudication and prosecution responsibilities of the Civil Service Commission.<sup>47</sup>

## II. THE MAKING OF BUSH v. LUCAS

One agency under the purview of the federal civil service system is the National Aeronautics and Space Administration (NASA). NASA was established by Act of Congress in July of 1958<sup>48</sup> to "plan, direct and conduct aeronautical and space activities."<sup>49</sup> NASA is headed by an Administrator and Deputy Administrator, both of whom are appointed by the President with the advice and consent of the Senate.<sup>50</sup> To carry out its mandate, NASA is authorized to "appoint and fix the compensation of such officers and employees as may be necessary. . . . Such officers and employees shall be appointed in accordance with the civil service laws,"<sup>51</sup> although certain scientific, engineering and administrative personnel may be appointed "without regard to such laws. . . ."<sup>52</sup> Those civil service laws are found in Chapter 33 of Title 5,<sup>53</sup> which governs the examination, selection and placement of civil servants generally. The statute is supplemented by various executive orders and rules pertaining directly to the agency. Executive Order No. 11955,<sup>54</sup> promulgated by President Gerald R. Ford, deals with the conversion to "career status" by certain specially appointed employees. Since most of the agency's employee positions fall within the competitive classification of the civil service, the full spectrum of civil service laws applies to the agency.

<sup>45</sup>Civil Service Reform Act of 1978, 92 Stat. 1119.

<sup>46</sup>*Id.* § (a). Pub. L. No. 95-454, §§ 906(a)(2), (3) (1978) substituted "Office of Personnel Management" for "Civil Service Commission" throughout chapter 51, part III of title 5.

<sup>47</sup>Civil Service Reform Act of 1978, 92 Stat. 1119 (codified at 5 U.S.C. ch. 77).

<sup>48</sup>Pub. L. No. 85-568, tit. II, § 202, 72 Stat. 429 (codified at 42 U.S.C. § 429), *amended by* Pub. L. No. 88-426, tit. III, § 305(R), 78 Stat. 423 (1964).

<sup>49</sup>42 U.S.C. § 2473(a)(1) (1982).

<sup>50</sup>*Id.* §§ 2472(a), (b).

<sup>51</sup>*Id.* §§ 2473(b)(2).

<sup>52</sup>*Id.*

<sup>53</sup>5 U.S.C. §§ 3301-3385 (1982).

<sup>54</sup>42 Fed. Reg. 2499 (1977).

NASA began operating on October 1, 1958, after absorbing the personnel and facilities of the National Advisory Committee for Aeronautics.<sup>55</sup> Since that time, other facilities and personnel have been added and the total staff now includes more than 15,000 scientists, engineers, technicians and administrators.<sup>56</sup> The agency has five program offices: the Office of Advanced Research Programs, the Office of Launch Vehicle Programs, the Office of Space Flight Programs, the Office of Life Science Programs, and the Office of Business Administration.<sup>57</sup> It has several field activities around the country including the George C. Marshall Space Flight Center located at Huntsville, Alabama.<sup>58</sup> This particular facility was transferred to NASA from the U.S. Army Ballistic Missile Agency on July 1, 1960 and is concerned with the development of launch vehicles and launch operations.<sup>59</sup> The Marshall Space Flight Center is staffed by several thousand federal civil service employees, including many engineers and scientists.<sup>60</sup> One such aerospace engineer was William C. Bush who, by 1979, "had been a civil service employee at Marshall Space Flight Center [for] several years."<sup>61</sup>

Bush was not particularly pleased with his position at Marshall in the summer of 1975.<sup>62</sup> He expressed his displeasure during a local television station interview, stating that, "he was not productively employed."<sup>63</sup> Not confining his criticism to one medium, Bush was also quoted by a local newspaper as having said that "his position at the Space Flight Center was 'a falsehood, a travesty and worthless.'"<sup>64</sup> Approximately one month later, Bush returned to the airwaves to state that "he had meaningful work to do only a small percentage of each day."<sup>65</sup> Given the high public interest in NASA,<sup>66</sup>

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<sup>55</sup>Section 301(a) of Pub. L. No. 85-568 (1958) provided:

The National Advisory Committee for Aeronautics, on the effective date of this section, shall cease to exist. On such date, all functions, powers, duties, and obligations, and all real and personal property, personnel, funds, and records of that organization shall be transferred to the Administration.

<sup>56</sup>19 Encyclopedia Americana 725 (1969).

<sup>57</sup>*Id.* at 726.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>Bush v. Lucas, 598 F.2d 958, 959 (5th Cir. 1979).

<sup>62</sup>This date is approximate. The events in question took place at about the time of the facility's fifteenth anniversary. It was established in 1960.

<sup>63</sup>Bush v. Lucas, 598 F.2d 958, 959 (5th Cir. 1979).

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>See generally Bush v. Lucas, 103 S. Ct. 2404, 2406-07 (1983) (comments of Supreme Court concerning public interest in NASA).



it was not surprising that Bush's "various statements were disseminated nationally by the wire services and appeared in newspapers in at least [four] states. . . ." <sup>67</sup> Bush's statements followed a reorganization of the Marshall facility in 1974 in which Bush was "twice reassigned to new positions." <sup>68</sup> Bush had objected to both reassignments and had "sought formal review by the Civil Service Commission." <sup>69</sup> His "highly critical" <sup>70</sup> statements were made while these administrative appeals were still pending. <sup>71</sup>

Bush's superiors were not amused. On June 25, 1975, William R. Lucas, the director of the Marshall Space Flight Center, in response to a reporter's inquiry, said that "I have had [Bush's] statement investigated and I can say unequivocally that such a statement has no basis in fact." <sup>72</sup> Two months later, an adverse personnel action was initiated to remove Bush "from his position." <sup>73</sup> Bush was charged with

publicly mak[ing] intemperate remarks which were misleading and often false, evidencing a malicious attitude towards management and generating an environment of sensationalism demeaning to the Government, the National Aeronautics and Space Administration and the personnel of the George C. Marshall Space Flight Center, thereby impeding Government efficiency and economy and adversely affecting public confidence in the Government service. <sup>74</sup>

He was also informed that "his conduct had undermined morale at the Center and caused disharmony and disaffection among his fellow employees." <sup>75</sup>

Bush was afforded an opportunity to make both written and oral responses, after which Lucas, acting as the "deciding official," <sup>76</sup> determined that Bush's actions justified dismissal, but that only the lesser penalty of demotion was warranted since it was Bush's "first

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<sup>67</sup>Bush v. Lucas, 598 F.2d at 959.

<sup>68</sup>Bush v. Lucas, 103 S. Ct. at 2406.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>Bush v. Lucas, 598 F.2d at 959.

<sup>73</sup>Bush v. Lucas, 103 S. Ct. at 2407.

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>Bush v. Lucas, 598 F.2d at 960.

offense."<sup>77</sup> Bush was demoted from GS-14 to GS-12, which decreased his annual salary by "approximately \$9,716.00."<sup>78</sup>

Bush exercised his right to appeal to the Federal Employee Appeals Authority, which concluded that the appeal was without merit:

It specifically determined that a number of [Bush's] public statements were misleading and that, for three reasons, they 'exceeded the bounds of expression protected by the First Amendment.' First [Bush's] statements did not stem from public interest, but from his desire to have his position abolished so that he could take early retirement and go to law school. Second, the statements conveyed the erroneous impression that the agency was deliberately wasting public funds, thus discrediting the agency and its employees. Third, there was no legitimate public interest to be served by abolishing [Bush's] position.<sup>79</sup>

Bush could have obtained judicial review of the Authority's decision in a federal district court or in the Court of Claims but chose not to do so.<sup>80</sup> Two years later, he requested the Civil Service Commission's Appeal Review Board "to reopen the proceeding."<sup>81</sup> Upon review of the case, that agency balanced Bush's apparent personal motive in making the statement against his and the public's interest in free speech.<sup>82</sup> It noted that Bush's statements, "though somewhat exaggerated, were not wholly without truth" and that they had "properly stimulated public debate."<sup>83</sup> The Board concluded that the proven disruption to the agency's operation did not "justify abrogation of the exercise of free speech"<sup>84</sup> and recommended that Bush

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<sup>77</sup>Bush v. Lucas, 103 S. Ct. at 2407.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at n.4. Bush might have challenged NASA's decision on the ground that Lucas' statements about the accuracy of Bush's complaints indicated a prejudgment of the case, thereby denying Bush due process. See *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

<sup>81</sup>Bush v. Lucas, 103 S. Ct. at 2407. Under the regulations then in effect, the Federal Employee Appeals Authority was an arm of the Civil Service Commission. 5 C.F.R. §§ 752.203, 772.101 (1975). A disappointed applicant could either obtain judicial review of the Authority's decision or request the Civil Service Commission's Appeals Review Board to reopen an adverse decision. *Id.* § 772.310. The Civil Service Reform Act transferred the Commission's adjudicative functions to the Merit Systems Protection Board. See 5 U.S.C. §§ 1205, 7543(d), 7701 (1982).

<sup>82</sup>Bush v. Lucas, 103 S. Ct. at 2407.

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

be retroactively restored to his former position. NASA accepted the recommendation, restored Bush to his GS-14 rating, and awarded him approximately \$30,000 in back pay.<sup>86</sup>

While Bush's administrative claims were being processed, he commenced an action against Lucas in the state courts of Alabama, seeking damages for Lucas' alleged defamation of Bush on June 25, 1975, and for violation of Bush's "constitutional rights" by demoting him with the "malicious intent to punish Bush for public comments about his job."<sup>87</sup> Lucas promptly removed the lawsuit to the United States district court and moved for summary judgment.<sup>87</sup> That court granted the motion on the dual grounds that "the defamation claim could not be maintained because . . . [Lucas] was absolutely immune from liability for damages for demotion,<sup>88</sup> and second, that [Bush's] demotion was not a constitutional deprivation for which a damages action could be maintained."<sup>89</sup> The Fifth Circuit Court of Appeals affirmed, finding that "the district court correctly analyzed Bush's constitutional claims. . . ."<sup>90</sup> Bush then petitioned the Supreme Court for a writ of certiorari, which was granted.<sup>91</sup> In a memorandum opinion, the Court vacated the lower court's judgment and remanded the case back to the Court of Appeals "for further consideration in light of *Carlson v. Green*. . . ." a case in which the Court had permitted a constitutional cause of action to be implied under the Eighth Amendment.<sup>92</sup>

In its opinion on remand,<sup>93</sup> the Court of Appeals concluded that "*Carlson* [did] not dictate a contrary result"<sup>94</sup> and reaffirmed the summary judgment. In so doing, the court said that "the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress."<sup>95</sup>

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<sup>86</sup>*Id.*

<sup>87</sup>*Bush v. Lucas*, 598 F.2d at 960.

<sup>88</sup>*Bush v. Lucas* 103 S. Ct. at 2408.

<sup>89</sup>*Id.* (citing *Barr v. Mateo*, 360 U.S. 564 (1959)).

<sup>90</sup>*Bush v. Lucas*, 103 S. Ct. at 2408 (footnote omitted).

<sup>91</sup>*Bush v. Lucas*, 598 F.2d at 961.

<sup>92</sup>*Bush v. Lucas*, 446 U.S. 914 (1980).

<sup>93</sup>*Id.* In *Carlson v. Green*, 445 U.S. 14 (1980), the Court held that a damage action could be maintained against federal prison officials for constitutional violations, even though the plaintiff could also maintain such a suit under the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1982).

<sup>94</sup>*Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981).

<sup>95</sup>*Id.* at 575.

<sup>96</sup>*Id.* at 577.

Demonstrating tenacity, Bush again sought Supreme Court review. His petition for certiorari was again granted<sup>96</sup> and the case was argued January 19, 1983.<sup>97</sup>

Six months later, the Court affirmed the Court of Appeals.<sup>98</sup> The Court considered Bush's claim a request "to authorize a new non-statutory damages remedy for federal employees whose First Amendment rights are violated by their superiors."<sup>99</sup> It denied the request "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States" and because, "it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy."<sup>100</sup>

In order to reach that issue, the Court first made two important assumptions. It assumed that Bush's First Amendment rights had been violated by the adverse personnel actions taken against him,<sup>101</sup> and that, "civil service remedies were not as effective as an individual damages remedy and did not fully compensate him for the harm he suffered."<sup>102</sup> The Court also took note of two "undisputed propositions:"

Congress has not expressly authorized the damages remedy that petitioner asks us to provide. On the other hand, Congress has not expressly precluded the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress.<sup>103</sup>

With these "assumptions" and "propositions" in mind, the Court then considered the legal remedies that were available to a federal employee in Bush's position. The Court noted that it had "the

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<sup>96</sup>102 S. Ct. 7403 (1982).

<sup>97</sup>103 S. Ct. 2403 (1983).

<sup>98</sup>*Id.*

<sup>99</sup>*Id.* at 2406.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 2407. In so assuming, the Court noted: "Competent decisionmakers may reasonably disagree about the merits of (Bush's) First Amendment claim." *Id.* at n.7.

<sup>102</sup>*Id.* at 2408. Bush claimed that the civil service remedies did not provide for punitive damages, a jury trial, attorneys' fees, and compensation for harm to dignity or emotional distress. *Id.* at nn. 8, 9. Justice Marshall, in concurring, did not agree that Bush's civil service remedies were substantially less effective than an individual damage remedy. He noted that the "burden of proof in an action before the Civil Service Commission must be borne by the agency, rather than by the discharged employee. . . ." and that "the employee is not required to overcome the qualified immunity of executive officials as he might be required to in a suit for money damages. . . ." Moreover, "an administrative action is likely to prove speedier and less costly. . . ." *Id.* at 2418 (Marshall, J., concurring).

<sup>103</sup>*Id.* at 2408.

authority to choose among available judicial remedies in order to vindicate constitutional rights," and that it had in the past "fashioned a wide variety of nonstatutory remedies for violations of the Constitution by federal and state officials."<sup>104</sup> It affirmed the principle established in earlier cases<sup>105</sup> that "the Constitution itself supports a private cause of action for damages against a federal official."<sup>106</sup> The Court adopted Justice Harlan's analysis of the problem presented by such claims as expressed in his concurring opinion in the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>107</sup> where he said the real question is not "whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of that power."<sup>108</sup>

Two criteria that could defeat private damages actions based on the Constitution were pinpointed in *Carlson v. Green*.<sup>109</sup> One was a congressional determination that such actions should be foreclosed by the provision of an alternative, exclusive statutory remedy. This congressional intent could be evidenced by "statutory language, by clear legislative history, or perhaps even by the statutory remedy itself. . . ."<sup>110</sup> The other was the presence of "special factors counselling hesitation in the absence of affirmative action by Congress."<sup>111</sup>

The Court could not find a congressional determination of exclusivity in Bush's case: "Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks or by providing him with an equally effective substitute."<sup>112</sup> The Court did, however, find that "special factors counselling hesitation" were present since "the ultimate question on the merits in this case may appropriately be characterized as one of 'federal personnel policy.'"<sup>113</sup> An extensive review of a federal civil

<sup>104</sup>*Id.* at 2409 (citing *United States v. Lee*, 106 U.S. 196 (1882); *Wiley v. Sandler*, 179 U.S. 58 (1900); *Ex parte Young*, 209 U.S. 123 (1908); *Weeks v. United States*, 232 U.S. 383 (1914); *Jacobs v. United States*, 290 U.S. 13 (1933); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)). See generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1124-27 (1969).

<sup>105</sup>*Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979); *Biven v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>106</sup>*Bush v. Lucas*, 103 S. Ct. at 2409 (citations omitted).

<sup>107</sup>403 U.S. 388, 406 (1971).

<sup>108</sup>*Id.*

<sup>109</sup>446 U.S. 14, 18-19 (1980).

<sup>110</sup>*Bush v. Lucas*, 103 S. Ct. at 2411.

<sup>111</sup>*Carlson v. Green*, 446 U.S. at 18-19.

<sup>112</sup>*Bush v. Lucas*, 103 S. Ct. at 2411.

<sup>113</sup>*Id.* at 2412.

servant's legal remedies for retaliatory demotion or discharge premised on the exercise of First Amendment rights was therefore undertaken by the Court. It noted: "During the era of the patronage system that prevailed in the federal government prior to the enactment of the Pendleton Act in 1883, . . . the federal employee had no legal protection."<sup>114</sup> The Court traced the development of the relevant law through the enactment of the Lloyd-LaFollette Act in 1912, which provided that "no person in the classified Civil Service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service. . . ."<sup>115</sup> Finally, it outlined the "detailed regulations [promulgated] by the Civil Service Commission,"<sup>116</sup> then in existence. The Court concluded that Congress intended that the remedies created by the extensive civil service legislation and regulations "would put . . . [an] employee 'in the same position' he would have been in had the unjustified or erroneous personnel action not taken place."<sup>117</sup> "Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available. . . .,"<sup>118</sup> the question for the Court became, "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy. . . ."<sup>119</sup>

To answer that question, the Court asserted: "The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy. . . ."<sup>120</sup> The Court then passed the baton to Congress:

Not only has Congress developed considerable familiarity with balancing governmental efficiency and the right of employees, but it also may inform itself through fact-finding procedures such as hearings that are not available to the Courts.

Nor is there any reason to discount Congress' ability to make an evenhanded assessment of the desirability of creating a new remedy for federal employees who have

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<sup>114</sup>*Id.* at 2412-13.

<sup>115</sup>37 Stat. 539, 555 (1912).

<sup>116</sup>103 S. Ct. at 2415 (citing 5 C.F.R. §§ 752, 772 (1975)).

<sup>117</sup>103 S. Ct. at 2416 (quoting S. Rep. No. 1062, 89th Cong., 2d Sess. 1 (1966)).

<sup>118</sup>103 S. Ct. at 2416.

<sup>119</sup>*Id.*

<sup>120</sup>*Id.*



been demoted or discharged for expressing controversial views. Congress has a special interest in informing itself about the efficiency and morale of the Executive Branch.<sup>121</sup>

Thus, while Bush's dispute with his federal employer was at last settled, the status of similar private damages claims by federal employees against their federal superiors has not been definitely resolved. This perhaps is highlighted most vividly in Justice Marshall's concurring opinion in *Bush*, which stated that "there is nothing in today's decision to foreclose a federal employee from pursuing a *Bivens*<sup>122</sup> remedy where his injury is not attributable to personnel actions which may be remedied under the federal scheme."<sup>123</sup> Even the majority opinion noted that the federal scheme of redress has its limitations:

Not all personnel actions are covered by this system. For example, there are no provisions for appeal of either suspensions for 14 days or less, 5 U.S.C. §7503 (supp. V 1981) [5 U.S.C.S. §7503], or adverse actions against probationary employees, §7511. In addition, certain actions by supervisors against federal employees, such as wire-tapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme.<sup>124</sup>

Consequently, it is no surprise that the *Bush* decision may have created as many questions as it resolved. This article will examine the impact of the *Bush* decision upon a federal employee's right to seek damages from his or her federal superior for injuries consequent upon violations of the employee's constitutional rights.

## II. THE GENESIS OF RIGHTS OF ACTION BASED UPON THE CONSTITUTION

To begin such an analysis, one would do well to survey the provisions of the Constitution which have been recognized as capable of supporting a private right of action against federal officials for damages. The *Bush* decision, as noted above, affirmed the principle

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<sup>121</sup>*Id.* at 2417.

<sup>122</sup>See *infra* text accompanying notes 127-30.

<sup>123</sup>103 S. Ct. at 2418 (Marshall, J., concurring).

<sup>124</sup>*Id.* at 2415 n.28.

that the "Constitution itself supports a private right of action against federal officials."<sup>125</sup> This principle is not as long standing as the Court intimated for "prior to 1971, the federal courts had never directly addressed the issue of the implication of a cause of action directly from a provision of the United States Constitution or a federal statute."<sup>126</sup> In that year, the Court decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>127</sup> which definitively resolved the issue. In *Bivens*, the Court implied that it was doing nothing novel: "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."<sup>128</sup> To support its claimed preservation of the *status quo*, the Court quoted from *Marbury v. Madison*:<sup>129</sup> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>130</sup>

Despite this aura of *stare decisis*, the Court was doing something quite novel in the field of constitutional law:

The positive law of the Constitution has largely been created and applied in cases in which the citizen seeks to invoke a constitutional guarantee as a shield to ward off actions undertaken by the government. The sanction most frequently imposed in response to a constitutional violation is the sanction of nullification. . . . Far less frequently has a constitutional right become an ingredient of an affirmative cause of action. In those instances in which courts have allowed the Constitution to be so utilized, moreover, they have almost invariably done so in reliance upon a legislative mandate. . . . But in [*Bivens*] . . . , the Supreme Court allowed such an action and finally answered the question it had left undecided some twenty-five years earlier. . . .<sup>131</sup>

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<sup>125</sup>*Id.* at 2409 (citations omitted).

<sup>126</sup>Annot., *Implications of Private Right of Action From Provisions of the United States Constitution—Federal Cases*, 64 L. Ed.2d 872 (1980).

<sup>127</sup>403 U.S. 388, 395 (1971).

<sup>128</sup>*Id.*

<sup>129</sup>1 Cranch 61 (1803).

<sup>130</sup>*Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 1 Cranch 61, 87 (1803)).

<sup>131</sup>Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532 (1972).

Nonetheless, the principle that a private damages action could be supported directly by a provision of the Constitution, specifically, the Fourth Amendment, was firmly established in *Bivens*.

The specific holding in *Bivens* is of potential use to federal employees. Bivens based his claim directly on the Fourth Amendment since the harm he suffered was the result of an improper arrest, search, and seizure. As will be discussed below, federal employees may also be the victims of such misconduct on the part of their superiors and they may well suffer the "humiliation, embarrassment and mental suffering"<sup>132</sup> that Bivens did. Federal employees may also face a potential injury that Bivens did not: the use of any evidence seized during the illegal arrest, search, or seizure in support of adverse employment action. Whether *Bush* forecloses a *Bivens* type action in such a situation will be discussed below.

Subsequent to the *Bivens* case, the courts have repeatedly been asked to decide whether other sections of the Constitution give rise directly to private damages actions. In addition to *Bivens*, the *Bush* decision itself listed two such cases: *Davis v. Passman*,<sup>133</sup> and *Carlson v. Green*.<sup>134</sup>

Shirley Davis worked for Congressman Otto Passman as a deputy administrative assistant until July 31, 1974. Her letter of termination declared that the reasons for her dismissal were as follows:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.<sup>135</sup>

Obviously, Ms. Davis did not agree. She brought suit alleging that the congressman's action discriminated against her on the "basis of sex in violation of the United States Constitution and the Fifth Amendment thereto."<sup>136</sup> Davis could not bring her claim under Title VII of the Civil Rights Act of 1964,<sup>137</sup> because subsection 717 of that Title, the amendment which extended the protection of the Act to

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<sup>132</sup>*Bivens*, 403 U.S. at 389.

<sup>133</sup>422 U.S. 228 (1979).

<sup>134</sup>446 U.S. 14 (1980).

<sup>135</sup>*Davis v. Passman*, 442 U.S. at 231 n.3.

<sup>136</sup>*Id.*

<sup>137</sup>Civil Rights Act of 1964, tit. VII, 86 Stat. 111 (codified at 42 U.S.C. §§ 2000e-16).

federal employees, "failed to extend this protection to congressional employees such as [Davis] . . . who are not in the competitive service."<sup>138</sup> Consequently: "For Davis as for Bivens, 'it [was] damages or nothing.'"<sup>139</sup> The issue was "whether a cause of action and a damages remedy can . . . be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated."<sup>140</sup> Noting that "there is in this case 'no explicit congressional declaration that persons in . . . [Davis'] position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury,"<sup>141</sup> the Court answered the question in the affirmative and also said that subsection 717 of Title VII of the Civil Rights Act of 1964 did not foreclose any available remedies to those unprotected by the statute.

Because Davis had no alternate form of relief, the majority did not have to consider, as it did in *Bush*, whether an alternative system pre-empted her private suit. Nor did the lead opinion, much to the chagrin of the dissent,<sup>142</sup> discover any "special factors counselling hesitation."<sup>143</sup>

The *Davis* decision is of little interest to most federal employees because the majority of them, unlike Davis, are included in the classified civil service. The Supreme Court, in the case of *Brown v. G.S.A.*,<sup>144</sup> has determined that the remedy provided to such employees by §717 of the Civil Rights Act of 1964<sup>145</sup> for violations of rights guaranteed by the statute is exclusive. Consequently, even though the Fifth Amendment does support a direct cause of action,

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<sup>138</sup>442 U.S. at 247. Had Davis been in the competitive service and thus covered by section 717 of title VII of the Civil Rights Act of 1964, she would have been precluded from seeking other forms of relief. In *Brown v. G.S.A.*, 425 U.S. 820 (1976), the Court had held that the remedies provided by section 717 were exclusive for covered employees seeking redress for violation of rights guaranteed by the statute.

<sup>139</sup>*Davis v. Passman*, 442 U.S. at 246 (quoting *Bivens*, 403 U.S. at 410).

<sup>140</sup>442 U.S. at 231.

<sup>141</sup>*Id.* at 247-48 (quoting *Bivens*, 403 U.S. at 397).

<sup>142</sup>The dissent argued:

In sum, the decision of the Court today is not an exercise of principled discretion. It avoids our obligation to take into account the range of policy and constitutional considerations that we would expect a legislature to ponder in determining whether a particular remedy should be enacted.

442 U.S. at 255-56 (Powell, J., dissenting).

<sup>143</sup>*Bivens*, 403 U.S. at 397.

<sup>144</sup>425 U.S. 820 (1976).

<sup>145</sup>42 U.S.C. § 2000e-16 (1982).

most federal employees must pursue their Title VII<sup>146</sup> remedy for employment related discrimination.

*Carlson v. Green* did not arise in an employment context and concerned a cause of action based on the Eighth Amendment's proscription against cruel and unusual punishment. Its application to the labor field would thus seem extremely limited. The opinion, however, is noteworthy in two respects. First, the Court gave little credence to the government's claim that exposing federal prison authorities to potential suit "might inhibit their efforts to perform their official duties."<sup>147</sup> This is interesting because, in *Bush*, the Court used the same concern to help justify its denial of Bush's claim:

[I]t is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases.<sup>148</sup>

Second, the Court stated that a *Bivens* type action could be defeated if "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."<sup>149</sup> In *Bush*, of course, the Court noted that Congress had not explicitly declared the civil service system of redress to be such a substitute, but refused in any event to allow a *Bivens* type action.

The Court in *Bush* did not mention another of its cases that dealt with the issue of damages actions based directly on the Constitution, even though it was decided the same day. The plaintiffs in *Chappell v. Wallace*<sup>150</sup> were five Navy enlisted men who sought to sue their military superiors for alleged violations of their Fifth Amendment rights. Specifically, they alleged racial discrimination in promotion opportunities and job assignments. The Court refused to authorize such actions, basing its decision on a "special factor counseling hesitation":

The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be

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<sup>146</sup>*Id.*

<sup>147</sup>*Carlson v. Green*, 446 U.S. at 19.

<sup>148</sup>*Bush v. Lucas*, 103 S. Ct. at 2417.

<sup>149</sup>*Carlson v. Green*, 446 U.S. at 19.

<sup>150</sup>*Chappell v. Wallace*, 103 S. Ct. 2362 (1983).

undermined by a judicially created remedy exposing of-  
ficers to personal liability at the hands of those they are  
charged to command. . . . [W]e must be "concern[ed]  
with the disruption of '[t]he peculiar and special relation-  
ship of the soldier to his superiors' that might result if the  
soldier were allowed to hale his superiors into Court."<sup>151</sup>

Given its uniquely military setting, *Chappell* is of little significance  
to civilian federal employees, except perhaps to the extent that it  
provides another illustration of what the Court would consider to be  
a "special factor counseling hesitation."<sup>152</sup>

The lower courts have also grappled with damages claims based  
directly on various parts of the Constitution. Few of the resulting  
decisions, however, have application to the employment setting.  
The First Amendment has been recognized as supportive of private  
damages actions in a number of cases<sup>153</sup> other than *Bush*. In one  
case, however, *Saffran v. Wilson*,<sup>154</sup> while recognizing the *Bivens*  
remedy generally, the court rejected the plaintiff's damages action,  
in part because of the difficulty of determining and valuing the al-  
leged injuries consequent upon the infringement of the plaintiff's  
First Amendment rights. However, it would seem no more difficult  
to value First Amendment injuries than it would Fourth Amendment  
injuries, such as humiliation, embarrassment and mental suffering,  
which had been recognized in *Bivens*.

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<sup>151</sup>*Id.* at 2367 (quoting *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 676 (1977)).

<sup>152</sup>Of more significance, but of limited utility because of the unique facts, is *Stanley v. United States*, 574 F. Supp. 474 (S.D. Fla. 1983). In *Stanley*, the court held that a former service member to whom lysergic acid diethylamide (LSD) was surreptitiously administered could maintain a *Bivens*-type suit against the individual officials involved. *Chappell* was distinguished on the ground that no alternative remedy existed to correct the constitutional wrong: "The constitutional wrong complained of by Mr. Stanley is impossible to correct. The plaintiff does not claim that the Army cheated him out of either money or a promotion. Rather, he alleges that the Army has knowingly deprived him of the ability to appreciate and enjoy his life. . . ." *Id.* at 485. The court further noted that the Veterans Benefit Act, 38 U.S.C. § 301-362 (1982), did not provide a statutory remedy as effective as a *Bivens* action, nor was it meant to be an exclusive remedy. *Conte Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983); *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

<sup>153</sup>*E.g.*, *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir.), *cert. denied*, 438 U.S. 916 (1977); *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976); *Paten v. LaPrade* 524 F.2d 862 (3d Cir. 1975); *Yianrouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir. 1975), *cert. denied*, 439 U.S. 983 (1983); *Liberman v. Schesventer*, 447 F. Supp. 1355 (M.D. Fla. 1978); *Kuczo v. Western Connecticut Broadcasting Co.*, 424 F. Supp. 1325 (D. Conn.), *rev'd on other grounds*, 566 F.2d 384 (2d Cir. 1976); *Patterson v. Chester*, 389 F. Supp. 1093 (E.D. Pa. 1975); *Butler v. United States* 365 F. Supp. 1035 (D.C. Cir. 1973).

<sup>154</sup>481 F. Supp. 228 (D. Colo. 1979).



The Fourth Amendment has supported many damages actions other than the type alleged in *Bivens*.<sup>155</sup> Not surprisingly, most have arisen out of criminal investigations. At least one, however, had its underpinnings in a federal employment relationship. The plaintiff in *Halperin v. Kissinger*,<sup>156</sup> a former member of the National Security Council, had had his home telephone tapped pursuant to orders of superiors. He sued for damages and the court held that not only was he entitled to recover money damages for any injuries suffered as a result of the Fourth Amendment violations, but also that he was due that compensation even if the injury suffered was "intangible,"<sup>157</sup> thus refuting the valuation difficulty found determinative in *Saf-fra*. Although it is not clear from the appellate opinion or the lower court decision,<sup>158</sup> Halperin was probably not a civil service employee.<sup>159</sup> Otherwise, he presumably would have encountered the same difficulties as Bush when his case reached the Supreme Court. Thus, the case's holding is analogous to *Davis v. Passman*. Both demonstrate that federal employees who are not protected by the civil service system are entitled to bring private damage actions based directly on the Constitution. More importantly, however, the *Halperin* decision does establish a precedent for the viability of a private damage action by a federal employee based directly on the Fourth Amendment against a superior. Read together with a footnote of the *Bush* decision,<sup>160</sup> which intimated that unauthorized wiretaps would not be cognizable under the civil service redress system unless the agency took further adverse action against the employee, the *Halperin* case may well establish an area of potential liability for federal supervisors.

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<sup>155</sup>*E.g.*, *Norton v. United States*, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978); *Asker v. Bloemker*, 548 F.2d 673 (7th Cir. 1976); *Wright v. Florida*, 495 F.2d 1086 (5th Cir. 1974); *United States v. Artieri*, 491 F.2d 440 (2d Cir.), *cert. denied*, 417 U.S. 949 (1974); *Bethea v. Reid*, 445 F.2d 1163 (3d Cir.), *cert. denied*, 404 U.S. 1061 (1971); *Felder v. Daley*, 403 F. Supp. 1324 (S.D.N.Y. 1975).

<sup>156</sup>606 F.2d 1192 (D.C. Cir. 1979), *aff'd per curiam*, 452 U.S. 713 (1981).

<sup>157</sup>606 F.2d at 1207.

<sup>158</sup>*Halperin v. Kissinger*, 424 F. Supp. 838 (D.D.C. 1976).

<sup>159</sup>*Id.* at 840. Halperin was described as "a former chief of the National Security Council Planning Group," which position was not likely to be included in the competitive civil service.

<sup>160</sup>*Bush v. Lucas*, 103 S. Ct. at 2415 n.28:

Not all personnel actions are covered by this system. For example, there are no provisions for appeal of either suspensions for 14 days or less. 5 U.S.C. § 7503 (Supp. V 1981) or adverse actions against probationary employees, § 7511. In addition, certain actions by superiors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as "personnel actions" within the statutory scheme.

This produces an incongruous effect. Civil service employees who suffer actual adverse "personnel action," such as discharge, as a result of constitutional violations are precluded from asserting a damage action against the superior who authorized the action and must find relief within the civil service system. On the other hand, if no adverse action is taken and the employee suffers only "intangible" injury, he or she may sue the offending superior for damages since the wiretap is not an adverse personnel action cognizable in the civil service scheme. Savvy superiors would thus do well to compound the error of their ways by imposing adverse personnel action whenever the propriety of their wiretaps is questioned since they thus would preclude their own potential personal liability. In any event, the *Halperin* decision is of considerable importance to federal employees.

In addition to *Davis v. Passman*, several cases have recognized that a cause of action could be brought directly under the Fifth Amendment for violations of the rights which that Amendment protects.<sup>161</sup> At least two such cases have had their roots in federal employment disputes. In *Beeman v. Middendorf*,<sup>162</sup> a female employee of the U.S. Customs Service brought suit against the Secretary of the Navy for discriminating against her by adopting a policy whereby women customs agents assigned by the Customs Service to Navy ships for fulfillment of customs duties could be rejected, while all men customs agents so assigned were accepted. She attempted to "avoid the impact" of *Brown v. G.S.A.* "by pointing out that while petitioner Brown had brought his suit under various statutes other than Title VII, he did not assert a constitutional cause of action."<sup>163</sup> The court accepted the viability of constitutional damages actions in general but rejected the distinction drawn, saying that when the *Brown* Court "found that Title VII pre-empts all other

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<sup>161</sup>E.g., *Jacobsen v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part, rev'd in part on other grounds*, 440 U.S. 391 (1978); *Meiners v. Moriarty*, 563 F.2d 343 (7th Cir. 1977); *States Marine Lines Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974); *Lofland v. Meyers*, 442 F. Supp. 955 (S.D.N.Y. 1977); *Regan v. Sullivan*, 417 F. Supp. 399 (E.D.N.Y. 1976), *aff'd in part, rev'd in part on other grounds*, 557 F.2d 300 (2d Cir. 1977); *Johnson v. Alldredge*, 349 F. Supp. 1230 (M.D. Pa.), *aff'd in part, rev'd in part on other grounds*, 488 F.2d 820 (3d Cir. 1973), *cert. denied sub. nom. Cronrath v. Johnson*, 419 U.S. 882 (1974).

The Fourteenth Amendment, on the other hand, apparently does not support *Bivens*-type actions: "And the Fourteenth Amendment gives CTU [Chicago Teachers Union] no more comfort, for no *Bivens*-like right of action may be implied directly under that Amendment." *Chicago Teachers Union v. Board of Educ. of Chicago*, 569 F. Supp. 597, 600 (N.D. Ill. 1983).

<sup>162</sup>425 F. Supp. 713 (D.D.C. 1977).

<sup>163</sup>*Id.* at 715.

remedies for federal employment discrimination, it meant to include the constitutional cause of action within the scope of those supplanted remedies."<sup>164</sup>

The plaintiff in *Doe v. United States Civil Service Commission*<sup>165</sup> met with more success. She had applied for a White House Fellowship in 1974, but was rejected as the result of an investigation into her background. The investigation had been conducted by the Civil Service Commission (CSC) even though the fellowship positions were "noncompetitive" positions.<sup>166</sup> Doe sued the CSC and some of its individual officers under a variety of theories, including an allegation that

the defendants violated her constitutional rights of privacy and due process by entering derogatory allegations in her file without adequately investigating the matter and without affording her the opportunity to refute those charges. She also contends that the CSC deprived her of due process by refusing to disclose the identity of the sources while also refusing to expunge the allegations.<sup>167</sup>

In a long and complicated opinion, the court implicitly rejected the privacy claim since "Doe was not asserting that the government had wrongfully intruded into her personal affairs,"<sup>168</sup> but chose instead to analyze the constitutional claim under the Due Process Clause.<sup>169</sup> Using this approach, the court referred to several cases involving discharge from employment<sup>170</sup> and said:

As in the dismissal cases, the merits of the Commission's employment decision do not raise a constitutional issue; Doe is not challenging that determination and this Court would not consider a direct review of the selection process *per se*. The constitutional claim that is raised . . . concerns the procedures that must be followed when an individual is deprived of government employment and the allegedly defamatory grounds for the employment de-

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<sup>164</sup>*Id.* at 715-16.

<sup>165</sup>483 F. Supp. 539 (S.D.N.Y. 1980).

<sup>166</sup>*Id.* at 547.

<sup>167</sup>*Id.* at 562.

<sup>168</sup>*Id.* at 567.

<sup>169</sup>*Id.*

<sup>170</sup>*E.g.*, *Codd v. Velger*, 429 U.S. 624 (1977) (*per curiam*); *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

cisions are disclosed in a manner that forecloses other job opportunities. . . . The liberty interest protected by the Due Process Clause prohibits the government from depriving an individual of government employment on the basis of false charges and then aggravating the injury, and further diminishing employment opportunities by tarnishing the individual's name and reputation.<sup>171</sup>

Accordingly, the Court then permitted Doe to maintain her damage action against CSC officials *despite* the fact that Doe possessed alternative avenues of relief, including pursuit of her claim through the "bureaucratic channels of the CSC," Administrative Procedure Act claims,<sup>172</sup> and Privacy Act claims.<sup>173</sup> The court thus contrasted Doe's position with Davis', but concluded the difference was not controlling.

The impact of *Bush* upon *Doe* is difficult to assess. Certainly, employees or applicants like Doe who are not covered by the civil service system may bring private damage actions directly upon the Due Process Clause on the strength of *Doe*, even if they may be entitled to other forms of relief. However, the case may also apply to employees who are covered by the system. If certain federal employment decisions that do not amount to personnel actions, such as promotion, transfer, security clearance authorization or revocation, are based on information obtained and used in the same fashion as that found objectionable in *Doe*, it would seem that *Bush* would not preclude private damage actions brought by such employees to vindicate their due process rights, even if they could obtain some relief under the Administrative Procedure or Privacy Acts. This point is discussed further below.

The Sixth Amendment has been held to give rise to an implied right of action in *Berlin Democratic Club v. Rumsfeld*.<sup>174</sup> *Berlin Democratic Club* is closely analogous to the Fourth Amendment cases since it arose out of an improper electronic surveillance; it thus adds little to the discussion at hand. Of similar import are those lower court cases concerning implied causes of actions arising from the Eighth Amendment.<sup>175</sup>

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<sup>171</sup>*Doe*, 483 F. Supp. at 569-70.

<sup>172</sup>5 U.S.C. §§ 551-706 (1982).

<sup>173</sup>*Id.* §§ 522, 552.

<sup>174</sup>410 F. Supp. 144 (D.D.C. 1976).

<sup>175</sup>*E.g.*, *Hernandez v. Lattimore*, 612 F.2d 61 (2d Cir. 1979); *Cline v. Herman*, 601 F.2d 374 (8th Cir. 1979); *Chapmann v. Pickett*, 586 F.2d 22 (7th Cir. 1978); *Botuay v. Carlson*, 475 F. Supp. 836 (E.D. Va. 1979).

### III. DEFEATING THE IMPLIED CAUSE OF ACTION

Common to most of these cases has been an absence of the "two situations," first mentioned in *Bivens*, which could defeat a right to recover damages:

The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." . . . The second is when defendants show that Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.<sup>176</sup>

It is not readily clear which of the "two situations" the Court found decisive in *Bush*. The Court recognized the absence of congressional declaration that the civil service system of redress was meant to be an equally effective substitute for a constitutional cause of action, but also analyzed the nature of the system in sufficient detail to be able to conclude that it was "comprehensive," "elaborate," and "constructed step by step with careful attention to conflicting policy considerations."<sup>177</sup> Nonetheless, its stated reason for denying Bush's claim was that there were present in the case "special factors counseling hesitation."<sup>178</sup> Thus, while the two factors may be separately stated, they are often inextricably linked in analysis.

It is useful to note how the presence of an alternative remedial scheme has been treated in other cases. Foremost among them is *Brown v. G.S.A.*<sup>179</sup> in which the Court concluded that "§717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial

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<sup>176</sup>*Carlson v. Green*, 446 U.S. at 18 (quoting *Bivens*, 403 U.S. at 396).

<sup>177</sup>*Bush v. Lucas*, 103 S. Ct. at 2416.

<sup>178</sup>*Id.* at 2417 (Marshall, J., concurring). The need to consider "special factors counseling hesitation was a determinative factor in the somewhat novel case of *Stevens v. Morrison-Knudsen Saudi Arabia Consortium*, 675 F. Supp. 516 (D. Md. 1983). The question there was "whether a private company operating under a contract with the federal government may be sued for alleged violations of the constitutional rights of its employees in a foreign country?" *Id.* at 516. Answering in the negative, the court noted four "special factors counseling hesitation": the employer was a private party, there was no state action involved, the acts complained of—notifying Saudi authorities of possible marijuana use by the plaintiffs—occurred in a foreign country, and the acts were hardly those which should have been viewed as subjecting the actor to potential liability for damages.

<sup>179</sup>425 U.S. 820 (1976).

remedy for claims of discrimination in federal employment."<sup>180</sup> This conclusion was based not only on the "balance, completeness and structural integrity of §717,"<sup>181</sup> but also on the principle that "a narrowly tailored employee compensation scheme preempts the more general tort recovery statutes."<sup>182</sup> It is noteworthy that the Court looked to the potential effect upon the statutory remedy if suits based on sources other than the statute itself were permitted. The Court speculated that aggrieved parties would circumvent the statute's "rigorous administrative requirements and time limitations,"<sup>183</sup> if permitted to sue under another theory. Worse yet, the Court thought that "the crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated. . . ."<sup>184</sup> This concern, of course, would be equally justified in evaluating the potential effect of private damage suits upon the role of the civil service system in controlling the federal employment relationship.

Another Supreme Court case that considered the effect of an alternative scheme upon the propriety of affording *Bivens* type relief is *Carlson v. Green*.<sup>185</sup> The alternate scheme in *Carlson* was the Federal Torts Claims Act (FTCA).<sup>186</sup> The Court noted that "when Congress amended FTCA in 1974<sup>187</sup> to create a cause of action against the United States for intentional torts committed by federal law enforcement officers . . . the congressional comments accompanying that amendment made it crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action."<sup>188</sup> The Court further enumerated other factors that supported its conclusion, including "the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy."<sup>189</sup> For the Court: "Plainly, FTCA is not a sufficient

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<sup>180</sup>*Id.* at 835. See also *Sorrell v. Veterans Admin.*, 576 F. Supp. 1254 (S.D. Ohio 1983) (citing both *Brown* and *Bush* as authority for holding that § 717 of the Civil Rights Act of 1964 was the exclusive remedy for claims of discrimination in the context of federal employment).

<sup>181</sup>425 U.S. at 832.

<sup>182</sup>*Id.* at 834 (citing *United States v. Demko*, 385 U.S. 149 (1966) (Federal Tort Claims Act); *Patterson v. United States*, 359 U.S. 495 (1959) (Federal Employees' Compensation Act); *Johnson v. United States*, 343 U.S. 427 (1952) (Public Vessels Act)).

<sup>183</sup>425 U.S. at 833.

<sup>184</sup>*Id.*

<sup>185</sup>446 U.S. 14 (1980).

<sup>186</sup>28 U.S.C. §§ 2671-2680 (1982).

<sup>187</sup>*Id.* § 2680(h).

<sup>188</sup>*Carlson v. Green*, 446 U.S. at 19-20.

<sup>189</sup>*Id.* at 20.



protection of the citizen's constitutional rights. . . ."<sup>190</sup> Consequently, to the extent that they are not otherwise precluded by statute, federal employees could not be deterred from asserting damage actions against their superiors solely because their claim might also be cognizable under the Federal Tort Claims Act.

*Doe v. United States Civil Service Commission*,<sup>191</sup> as noted above discussed several alternative remedies. Analyzed first were Doe's remedies within the "bureaucratic channels" of the agency itself. These included requests to amend her file and for disclosure of the sources upon which the agency had relied in assembling the file. Both requests had been denied. The difference between *Doe* and *Bush* is that *Bush* could appeal to the civil service grievance machinery, while *Doe*, not being a competitive service employee, could not. That difference, however, is far from clear in all civil service employee cases. If the action complained of did not amount to an "adverse personnel action," it is by no means certain that a civil service employee could receive any more relief than *Doe* did. The second remedy available to *Doe* was the Administrative Procedure Act.<sup>192</sup> Section 702 of the APA provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." It has been held that invasion of a protected right constitutes a legal wrong within the meaning of this section,<sup>193</sup> but it has also been held that, "the review provisions of the Administrative Procedure Act . . . are not generally applicable to the administration of the Federal Civil Service."<sup>194</sup> The *Doe* court decided that it had the authority, under the APA, to determine "whether *Doe*'s constitutional rights were violated,"<sup>195</sup> but that it lacked jurisdiction to determine whether "the CSC's conduct was arbitrary and an abuse of discretion" on "sovereign immunity"<sup>196</sup>

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<sup>190</sup>*Id.* at 23. See also *Lipsett v. University of Puerto Rico*, 576 F. Supp. 1219 (D.P.R. 1983), which involved injunctive relief against a Veteran's Hospital. She alleged that the hospital's administrators had violated her constitutional rights by encouraging and participating in a decision to not promote her to the fourth year residency level. The case can also be cited for the proposition that sexual harassment can support a *Bivens*-type claim.

<sup>191</sup>483 F. Supp. 539 (S.D.N.Y. 1980).

<sup>192</sup>5 U.S.C. §§ 551-706 (1982).

<sup>193</sup>*Pennsylvania R.R. v. Dillon*, 355 F.2d 292 (D.C. Cir.), cert. denied, 379 U.S. 945 (1964).

<sup>194</sup>*Democratic State Central Comm. for Montgomery County, Maryland v. Andolsek*, 249 F. Supp. 1009 (D.D.C. 1966).

<sup>195</sup>*Doe*, 483 F. Supp. at 562.

<sup>196</sup>*Id.* at 575.

grounds. From these less than lucid points, it may be concluded that, if the APA does provide an aggrieved federal employee any relief for violations of constitutional rights, it would not bar a personal suit against the offending supervisor. The *Doe* case itself supports this view, as court there concluded that a cause of action under the APA did not preclude a separate, additional cause of action under the Constitution.

There is, however, authority to the contrary. In *McKenzie v. Calloway*,<sup>197</sup> a secretary claimed that her failure to be promoted was based on "reverse discrimination" grounds.<sup>198</sup> She was a civil servant and sought relief under both the APA and the Constitution. The court concluded that "no independent constitutional tort is necessary to effectuate the plaintiff's rights. . . . [T]he [APA] specifically sets forth the remedy Congress has provided for persons in plaintiff's position."<sup>199</sup> If *Doe* and *McKenzie* are compatible on this point, the consistency must be founded on the basis of the different wrongs asserted. This distinction is tenuous, however, and it may be more accurate to find the two cases in conflict. In any event, *Bush* would now control *McKenzie*'s claim since she was a civil service employee.

The third remedy available to *Doe*, and also available to a federal employee, was the Privacy Act.<sup>200</sup>

The Privacy Act of 1974 serves to safeguard the public interest in informational privacy by delineating the duties and responsibilities of federal agencies that collect, store and disseminate personal information about many individuals . . . Individuals can obtain access to agency records that pertain to them and can seek amendments to records thought to contain erroneous information.<sup>201</sup>

The court noted that the Privacy Act did not "expressly refer to the availability of other forms of relief," but concluded that "nothing in the statute or its legislative reports indicate that it was intended as an exclusive remedy for claims arising out of administrative investigations."<sup>202</sup> Consequently, the court did not find that the Privacy

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<sup>197</sup>456 F. Supp. 590 (E.D. Mich.), *aff'd*, 625 F.2d 754 (6th Cir. 1978).

<sup>198</sup>456 F. Supp. at 593.

<sup>199</sup>*Id.* at 596. It is curious that the court did not refer to *Brown v. G.S.A.*, since the complaint in that case was grounded in title VII considerations, but the significance of the opinion is its conclusion that the APA remedy rendered it unnecessary for the court to provide the plaintiff with a constitutional action.

<sup>200</sup>5 U.S.C. § 552 (1982).

<sup>201</sup>*Doe*, 483 F. Supp. at 555.

<sup>202</sup>*Id.* at 565.

Act remedies preclude Doe's *Bivens* claims. Presumably, the same result would be reached in a case involving a federal employee, to the extent that the employee's *Bivens* claims were not foreclosed by *Bush*.

Another alternative remedy that has been considered in deciding whether a plaintiff could state a constitutional cause of action has been the existence of a state cause of action. *Bivens* rejected a claim of pre-emptive state tort remedies in that context. At least one decision,<sup>203</sup> however, has "recognized that the availability of an adequate remedy under a . . . state law cause of action would preclude the necessity for implying a cause of action from a constitutional provision. . . ."<sup>204</sup> State causes of action for federal employment-related actions are speculative at best, and the same considerations that caused the Court in *Bivens* to reject them as a limit upon direct constitutional claims would also pertain.<sup>205</sup>

The second "situation" that may defeat a *Bivens* type claim is the presence of "special factors counseling hesitation." The *Bush* opinion relied primarily upon this factor to conclude that Bush could not sue his superior for infringement of his First Amendment violations. It did so under the rubric of "federal personnel policy."<sup>206</sup> If this rather all inclusive term were determinative of the issue, it would be fairly easy to conclude that no federal employee could ever make out a constitutional cause of action against his superior since, by

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<sup>203</sup>*Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I.), *aff'd*, 602 F.2d 458 (1st Cir. 1978).

<sup>204</sup>Annot., *Implication of Private Action From Provisions of United States Constitution—Federal Cases*, 64 L. Ed.2d 872, 876 (1980). See *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85 (1st Cir. 1983), which cited both *Carlson v. Green* and *Bush v. Lucas* in support of its denial of an attempt to maintain a derivative constitutional action which was otherwise barred by 42 U.S.C. § 1983 (1982). The court determined that to permit the action would effectively erase the doctrine of common law state legislative immunity which had been recognized since 1951. On the other hand, the existence of a comprehensive state civil service scheme for redress of grievances was held sufficient reason to bar an attempt to bring a federal civil rights action in *Almendral v. New York State Office of Mental Health*, 568 F. Supp. 571 (S.D.N.Y. 1983). Citing the *Bush* "special factors," the court said "Those considerations apply with equal force to the New York Civil Service laws. Article 78 of the Civil Practice Law and Rules provides both a vehicle for testing the lawfulness of agency action and remedies for persons injured by unlawful action. . . . This court sees no reason to depart from the reasoning in *Bush* and to accord state employees more protection than the Supreme Court has seen fit to afford to similarly situated federal employees." *Id.* at 578.

<sup>205</sup>One would think that the complex machinery of the National Labor Relations Act might constitute an important source of alternative relief for the aggrieved federal employee. The Act's definition of "employer," however, expressly excludes the federal government from its coverage. 29 U.S.C. § 152(2) (1982).

<sup>206</sup>*Bush v. Lucas*, 103 S. Ct. at 2412.

definition, such suits would affect federal personnel policy. More precisely, however, the Court looked to the "special factor" of the alternative scheme of redress set up by the civil service system to conclude that its hesitation in permitting a *Bivens* type remedy was warranted. Thus, it is clear that federal personnel policies, *per se*, do not mandate preclusion of such suits. If the converse were true, *Davis v. Passman* would have been decided differently, for it, too, involved questions of federal personnel policies. Further proof of this conclusion may be found in the fact that the Court in *Bush* cited another case that dealt with federal employment policies, but did not consider it dispositive of *Bush's* claim. The case was *United States v. Gilman*,<sup>207</sup> in which the federal government sought to "recover indemnity from one of its employees after having been held liable under the FTCA for the employee's negligence." Although *Gilman* did not concern a constitutionally based claim, it did involve the creation of a new remedy not specifically authorized by statute. In declining to create the remedy, the Court noted that the question "involved questions of employee discipline and morale, fiscal policy, and the efficiency of the federal service."<sup>208</sup> The Court intimated, just as it had in *Bush*, that, if the requested remedy should be fashioned, it should be fashioned by Congress:

Here a complex of relations between federal agencies and their staff is involved. Moreover, the claim now asserted through the product of a law Congress passed is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.<sup>209</sup>

Such "special factors" were also found in the cases of *Chappell v. Wallace*<sup>210</sup> and *United States v. Standard Oil Co.*<sup>211</sup> In the former, the special factors of military discipline and an internal comprehensive system of redress caused the Court to conclude that the maintenance of a *Bivens*-type suit by military personnel against their superior officers should not be permitted. In the latter, the

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<sup>207</sup>347 U.S. 507 (1954).

<sup>208</sup>*Bush v. Lucas*, 103 S. Ct. at 2412.

<sup>209</sup>*Gilman*, 347 U.S. at 511-13.

<sup>210</sup>103 S. Ct. 2362 (1983).

<sup>211</sup>332 U.S. 301 (1947).

Court refused to allow a damage action on behalf of the government against a tortfeasor who had injured a federal soldier, thereby causing the government to incur hospitalization expenses. It did so because a "special factor," *i.e.*, federal fiscal policy, was involved:

Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court, or the other federal courts, is the custodian of the national purse. By the same token, it is the primary and most often the exclusive arbiter of federal fiscal affairs.<sup>212</sup>

Since the "special factor counseling hesitation" in *Bush* was the existence of the "comprehensive" and "elaborate remedial system" created by the federal civil service laws, it is appropriate to examine that system in some detail.

#### IV. THE FEDERAL CIVIL SERVICE SYSTEM

Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner (*Bush*) are fully cognizable within this system. As the record in this case demonstrates, the Government's comprehensive scheme is costly to administer, but it provides meaningful remedies for employees who may have been unfairly disciplined. . . .<sup>213</sup>

When the Supreme Court wrote these words, it recognized that the civil service system had undergone legislative change between the time when *Bush* started his action and the Court ultimately ruled. The law, however, was substantially the same. The procedural rules that must be followed to discipline a federal competitive service

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<sup>212</sup>*Id.* at 314-15.

<sup>213</sup>*Bush v. Lucas*, 103 S. Ct. at 2415.

employee are specified in Chapter 75 of title 5 of the U.S. Code.<sup>214</sup> "Adverse actions" are divided into two types: suspensions for 14 days or less, covered by subchapter I,<sup>215</sup> and removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less, covered by subchapter II.<sup>216</sup> Suspensions in "the interests of national security,"<sup>217</sup> reductions in force,<sup>218</sup> reductions in grade or removal due to "unacceptable performance,"<sup>219</sup> and certain miscellaneous actions<sup>220</sup> are covered elsewhere. As will be seen, the procedures applicable to the two types of adverse action differ, but the statutory standard upon which both must be based does not: "Cause as will promote the efficiency of the service."<sup>221</sup>

Under subsection 7503:

An employee against whom a suspension for 14 days or less is proposed is entitled to: (1) an advance written notice stating the specific reasons for the action; (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) to be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date.<sup>222</sup>

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<sup>214</sup>5 U.S.C. § 7501 (1982). It should be noted that these procedures do not apply to individuals serving probationary or trial periods. *Id.* Probationary employees are subject to summary dismissal procedures. See *Shaw v. United States*, 622 F.2d 520 (Ct. Cl. 1980), *cert. denied*, 449 U.S. 881 (1981); *Horne v. United States*, 419 F.2d 416 (Ct. Cl. 1969); *Medoff v. Freeman*, 362 F.2d 472 (1st Cir. 1966); *Nadelhaft v. United States*, 131 F. Supp. 930 (Ct. Cl. 1955); *Kohlberg v. Gray*, 207 F.2d 35 (D.C. Cir.), *cert. denied*, 346 U.S. 937 (1953). Nor do the procedures apply to employees in the "excepted" service, *i.e.*, those not filling competitive service positions. They may generally be terminated at any time and without appeal. *Fowler v. United States*, 633 F.2d 1258 (8th Cir. 1980); *McGinty v. Brownell*, 249 F.2d 124 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 952 (1958). Railroad employees are covered by an entirely different system, the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982). The existence of that remedy has been held sufficient reason to deny a claim of a constitutional tort against an employer: "It is clear that Congress, in enacting the Railway Labor Act . . . intended to create a comprehensive statutory scheme for resolving employment disputes such as plaintiff's. . . . The court believes that Congress would not desire the circumvention of this statutory scheme through the use of constitutional tort claims." *Woodrum v. Southern Rwy Co.*, 571 F. Supp. 352, 359 (M.D. Ga. 1983).

<sup>215</sup>5 U.S.C. § 7502 (1982).

<sup>216</sup>*Id.* § 7512.

<sup>217</sup>*Id.* § 7532.

<sup>218</sup>*Id.* § 3502.

<sup>219</sup>*Id.* § 4303, as amended by Pub. L. No. 95-454, tit. II, § 203(a), 92 Stat. 1137 (1978).

<sup>220</sup>5 U.S.C. §§ 7512(c), (e).

<sup>221</sup>*Id.* § 7503, 7513.

<sup>222</sup>*Id.* § 7503(b).



The employee is also entitled to copies of all of the above documents "together with any supporting material upon request."<sup>223</sup> In addition to these protections, an employee who is subject to the more severe sanctions is entitled to at least 30 days advance notice and at least 7 days to respond.<sup>224</sup> The agency may also provide a hearing "in lieu of or in addition to the opportunity to answer."<sup>225</sup> If the employee is covered by a collective bargaining agreement, the terms of the agreement govern representation.<sup>226</sup> In arriving at its decision, the agency is limited to the reasons specified in the notice of proposed action.<sup>227</sup> Appeal to the Merit Systems Protection Board (MSPB) is specifically permitted if the more serious adverse actions are taken.<sup>228</sup> If the aggrieved employee is covered by a collective bargaining agreement, however, he or she may file a grievance under the agreement or pursue his or her MSPB remedy, but not both.<sup>229</sup>

Employees who have minor grievances, but who have not been the subject to adverse action as defined above, are not totally without relief. Employees covered by collective bargaining agreements may pursue the grievance procedures established by such agreements.<sup>230</sup> Employees not so covered, with stated exceptions,<sup>231</sup> may utilize the administrative grievance systems set up by their respective agencies pursuant to regulations.<sup>232</sup> These systems have cognizance over "any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management, including any matter on which an employee alleges that coercion, reprisal or retaliation has been practiced against him or her."<sup>233</sup> Each agency is free to adopt its own procedures, provided that they

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<sup>223</sup>*Id.* § 7503(c).

<sup>224</sup>*Id.* § 7513(b).

<sup>225</sup>*Id.* § 7513(c). Employees of the Senior Executive Service are entitled to the same protection under *id.* §§ 7541, 7543.

<sup>226</sup>5 C.F.R. § 752.203(d) (1984).

<sup>227</sup>*Id.* § 752.203(e).

<sup>228</sup>5 U.S.C. §§ 7513(d), 7543(d). If an employee does not have access to the Merit Systems Protection Board, he or she may have recourse to the Claims Court if the adverse action affects his or her pay. For example, in *Kennedy v. United States*, 22 Gov't Empl. Rel. Rep. (BNA) 1684 (Cl. Ct. July 31, 1984), a former Army employee, who had been suspended for ten days, was permitted to maintain a backpay action even though he had no right to appeal to the MSPB. The employee, a GS-13, claimed that the Army had violated his First Amendment rights by disciplining him for having written his congressman about the incompetence of a co-worker.

<sup>229</sup>*Id.* § 7121(e)(1); 5 C.F.R. 752.405(b).

<sup>230</sup>5 U.S.C. § 7121.

<sup>231</sup>5 C.F.R. § 771.206(b).

<sup>232</sup>*Id.* § 771.301(a).

<sup>233</sup>*Id.* § 771.205.

conform to the criteria specified by the Office of Personnel Management (OPM). These include a hearing "when one is suitable;"<sup>234</sup> the right of the grievant to be represented by a representative of his or her own choosing, a reasonable time to present the grievance, freedom from reprisal, a written decision, if the grievance itself was in writing, made by an official superior in grade to any employee involved, and other procedural protections.<sup>235</sup> Appeal is not available but the OPM monitors the various systems "from time to time."<sup>236</sup>

If the employee is to be demoted or "removed" for "unacceptable performance,"<sup>237</sup> he or she is generally entitled to the same procedural protections. The 30-day written notice must specify the "instances of unacceptable performance by the employee on which the proposed action is based, and . . . the critical elements of the employee's position involved in each instance of unacceptable performance."<sup>238</sup> The decision to demote or reduce must likewise specify the instances of unacceptable performance upon which it is grounded and cannot be based on any instances occurring more than one year before the date of the notice.<sup>239</sup> An employee demoted or removed under this section may appeal to the MSPB.<sup>240</sup> This section was added by Congress to make it possible for "civil servants to be . . . hired and fired more easily, but for the right reasons."<sup>241</sup>

By statute, "personnel actions," including appointment, promotion, discipline, detail, transfer, reassignment, reinstatement, restoration, reemployment, and performance evaluation, may not be based upon discriminatory considerations with respect to race, sex, religion, or national origin, but additional procedures to vindicate those rights are not specified.<sup>242</sup> Any adverse action based upon the prohibited considerations would not meet with the statutory standards of "cause as will promote the efficiency of the service" or unacceptable performance."<sup>243</sup>

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<sup>234</sup>*Id.* § 771.302.

<sup>235</sup>*Id.*

<sup>236</sup>*Id.* § 771.304.

<sup>237</sup> 5 U.S.C. § 4303, as amended by Pub. L. No. 95-454, tit. II, § 203(a), 92 Stat. 1133 (1978).

<sup>238</sup>*Id.*

<sup>239</sup>*Id.*

<sup>240</sup>*Id.*

<sup>241</sup> S. Rep. No. 969, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. Code Cong. & Ad. News 2724.

<sup>242</sup> 5 U.S.C. § 2303. Although not classified as "adverse actions" appealable to the MSPB under the Civil Service Reform Act, such actions may constitute a "prohibited personnel practice" which may be the subject of a complaint to be filed with the Office of Special Counsel of the MSPB. See *Watson v. Department of Housing and Urban Development*, 576 F. Supp. 580 (N.D. Ill. 1983).

<sup>243</sup> 5 C.F.R. § 752.403.

While "unacceptable performance" is susceptible to ordinary interpretation, the standard of "cause as will promote the efficiency of the service," upon which discipline must be based, is rather ambiguous. The statutory provisions wherein the standard is set forth<sup>244</sup> do not define it further. The implementing regulatory provisions<sup>245</sup> do not add more illumination except to state, as noted above, that an adverse action cannot be based upon any discriminatory consideration. Nonetheless, the Supreme Court has upheld the standard against constitutional attack:

We hold the standard of "cause" . . . as a limitation on the Government's authority to discharge federal employees is constitutionally sufficient against the charges both of overbreadth and of vagueness. . . . Congress sought to lay down an admittedly general standard, not for the purpose of defining criminal conduct, but in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection. We do not believe that Congress was confined to the choice of enacting a detailed code of employee conduct, or the granting of no job protection, at all.<sup>246</sup>

Thus, even though "cause" is not well defined, once it determines that such cause exists, an agency may discipline its employees. Determining what type of discipline to impose is usually a matter for agency discretion,<sup>247</sup> but many agencies have published tables of suggested penalties for particular offenses.<sup>248</sup> It has been held that the severity of the penalty imposed is within the discretion of the agency provided that the penalty chosen is within the range of sanctions provided by the applicable agency regulation.<sup>249</sup> On the other hand, *Halsey v. Nitze*<sup>250</sup> held that the agency may impose discipline for misconduct which is not listed in an agency's table of suggested punishments if the regulation containing the table suggests that other acts may also provide adequate cause for discipline.

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<sup>244</sup>5 U.S.C. §§ 7507, 5713.

<sup>245</sup>5 C.F.R. §§ 752.202, 752.403.

<sup>246</sup>*Arnett v. Kennedy*, 416 U.S. 134, 160 (1974), *reh'g denied*, 417 U.S. 922 (1975).

<sup>247</sup>Federal Personnel Manual, ch. 751 (1 July 1984).

<sup>248</sup>*E.g.*, Dep't of Army, Civilian Personnel Regs. No. 700 (13 Jan. 1960) (C.15, 1 July 1984); 751 (16 Sept. 1962).

<sup>249</sup>*Ricci v. United States*, 507 F.2d 1390 (Ct. Cl. 1974). *But cf.* *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 324 (1981): "We hold that the [MSPB's] authority under 5 U.S.C. 1205(a)(1) to 'take final action' on matters within its jurisdiction includes authority to modify or reduce agency-imposed penalties."

<sup>250</sup>*Halsey v. Nitze*, 390 F.2d 142 (4th Cir. 1968).

In any event, except for minor disciplinary sanctions, suspensions for 14 days or less, the aggrieved employee, as noted above, may appeal to the Merit Systems Protection Board (MSPB). The Board is composed of three members appointed by the President to seven year terms.<sup>251</sup> Employees may also appeal to MSPB under other specific statutes.<sup>252</sup> One statute, for example, provides for appeal to MSPB in any case in which the employee "has been affected by action" and the employee alleges "that a basis for the action was discrimination prohibited by"<sup>253</sup> the Civil Rights Act of 1964,<sup>254</sup> the Fair Labor Standards Act of 1938,<sup>255</sup> the Rehabilitation Act of 1973,<sup>256</sup> or the Age Discrimination in Employment Act of 1967.<sup>257</sup> Most of the Board's work is comprised of appellate jurisdiction, but it does have original jurisdiction in four situations, including, among others, actions brought by its Special Counsel and requests for informal hearings by persons removed from the Senior Executive Service.<sup>258</sup>

Regardless of how the case reaches the Board, once there, an employee has the right to a hearing for which a transcript is kept and to be represented by an attorney or other representative.<sup>259</sup> Attorney fees may be awarded to a prevailing employee in the "interests of justice."<sup>260</sup> Petitions for appeal must be filed within 20 days after the effective date of the action being appealed and the agency must respond within 15 days of receiving the petition for appeal.<sup>261</sup> One or more employees may file an appeal as representatives of a class of employees.<sup>262</sup> The decision whether to allow such an action is "guided but not controlled by the Federal Rules of Civil Procedure."<sup>263</sup> Provision is made for intervention,<sup>264</sup> substitution,<sup>265</sup> and consolidation and joinder.<sup>266</sup> Extensive discovery procedures allow "any person" to be "examined regarding any nonprivileged

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<sup>251</sup> 5 U.S.C. § 1101; 5 C.F.R. § 1201.1.

<sup>252</sup> See 5 C.F.R. § 1201.3.

<sup>253</sup> 5 U.S.C. § 7702(a)(1).

<sup>254</sup> 42 U.S.C. § 2000e-16.

<sup>255</sup> 29 U.S.C. § 206(d).

<sup>256</sup> *Id.* § 791.

<sup>257</sup> *Id.* §§ 631, 633a.

<sup>258</sup> 5 U.S.C. § 1101; 5 C.F.R. § 1202.1.

<sup>259</sup> 5 U.S.C. § 7701.

<sup>260</sup> *Id.* § 7701(a).

<sup>261</sup> 5 C.F.R. § 1201.22.

<sup>262</sup> *Id.* § 1201.27.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* § 1201.34.

<sup>265</sup> *Id.* § 1201.35.

<sup>266</sup> *Id.* § 1201.36.

matter"<sup>267</sup> before and during the hearing. Discovery issues not specifically covered by the regulatory procedures are resolved by reference to the Federal Rules of Civil Procedure, although the Rules are considered "instructive rather than controlling."<sup>268</sup> The parties may request the issuance of subpoenas<sup>269</sup> and the Board may seek enforcement of the same in the appropriate district court.<sup>270</sup> *Ex parte* communications concerning "the merits of the case or those which violate other rules requiring submissions to be in writing" are forbidden.<sup>271</sup>

At the hearing, which is public, a verbatim transcript is kept<sup>272</sup> and either party may obtain a copy upon payment of costs.<sup>273</sup> Witnesses who testify may be represented<sup>274</sup> and, if they are federal employees, are considered to be in an "official duty" status while doing so.<sup>275</sup> The regulatory provision regarding admissibility of evidence is sparse: "Evidence or testimony may be excluded from consideration by the presiding official if it is irrelevant, immaterial or unduly repetitious."<sup>276</sup>

The burden of proof as to issues of jurisdiction and timeliness of filing is on the employee, but lies with the agency on other matters.<sup>277</sup> By statute, the standard of proof varies with the statutory authority used by the agency to impose the challenged discipline. If the agency brought the action under certain provisions, the action will be sustained if supported by "substantial evidence," which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true."<sup>278</sup> If the agency brought its action "under any other provision of law or regulation," its decision will be upheld if supported by a "preponderance of the evidence," which is defined as: "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted

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<sup>267</sup>*Id.* § 1201.72.

<sup>268</sup>*Id.*

<sup>269</sup>5 U.S.C. § 1205(b)(2)(A); 5 C.F.R. § 1201.81.

<sup>270</sup>5 U.S.C. § 1205(c); 5 C.F.R. § 1201.85.

<sup>271</sup>5 C.F.R. §§ 1201.101, 1201.102.

<sup>272</sup>*Id.* § 1201.53.

<sup>273</sup>*Id.*

<sup>274</sup>*Id.* § 1201.32.

<sup>275</sup>*Id.*

<sup>276</sup>*Id.* § 1201.62.

<sup>277</sup>*Id.* § 1201.56.

<sup>278</sup>*Id.*

is more likely to be true than not true."<sup>279</sup> "This distinction was intended to provide a 'lower standard of proof' in performance cases 'because of the difficulty of proving that an employee's performance is unacceptable.'"<sup>280</sup>

"Affirmative defenses" are established by statute and require the Board to overturn agency action even if the agency has met its evidentiary standard. The three defenses are harmful error in the application of the agency's procedures in arriving at its decision, the decision was based on any of the prohibited practices described above, and the decision was not otherwise in accordance with the law.<sup>281</sup>

The presiding official must reach an "initial decision" and forward it to the parties and the Office of Personnel Management within 25 days of closing the record.<sup>282</sup> The decision must contain findings of fact and conclusions, together with supporting rationale, and an order of final disposition.<sup>283</sup> The decision becomes final 35 days after it is issued unless a party files a petition for review or the Board itself reopens the case.<sup>284</sup> The Board will deny such a petition unless it is shown that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.<sup>285</sup>

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<sup>267</sup>*Id.* § 1201.72.

<sup>268</sup>*Id.*

<sup>269</sup>5 U.S.C. § 1205(b)(2)(A); 5 C.F.R. § 1201.81.

<sup>270</sup>5 U.S.C. § 1205(c); 5 C.F.R. § 1201.85.

<sup>271</sup>5 C.F.R. §§ 1201.101, 1201.102.

<sup>272</sup>*Id.* § 1201.53.

<sup>273</sup>*Id.*

<sup>274</sup>*Id.* § 1201.32.

<sup>275</sup>*Id.*

<sup>276</sup>*Id.* § 1201.62.

<sup>277</sup>*Id.* § 1201.56.

<sup>278</sup>*Id.*

<sup>279</sup>*Id.*

<sup>280</sup>*Wells v. Hanis*, IMSPB 199, 205 (1979) (quoting S. Rep. No. 95-969, 95th Cong., 2d Sess. 1 (1978)).

<sup>281</sup>5 C.F.R. § 1201.56.

<sup>282</sup>*Id.* § 1201.111.

<sup>283</sup>*Id.*

<sup>284</sup>*Id.* § 1201.113.

<sup>285</sup>*Id.* § 1201.115.



If the Board grants a petition for review or reopens the case on its own motion, it may order further proceedings, require the filing of additional briefs, or hear further argument.<sup>286</sup> Its decision is then considered the "final" decision and "administrative remedies are considered exhausted," although the initial decision can also be the final administrative action if the employee fails to file for review.<sup>287</sup>

The Board is empowered to "affirm, reverse, remand, modify or vacate the decision" of a lower authority and to "order a date for compliance."<sup>288</sup> If an employee prevails, he or she is entitled under the provisions of the Back Pay Act<sup>289</sup> to agency correction of pertinent records and to receive

an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.<sup>290</sup>

The employee can also be credited with accumulated amounts of annual leave,<sup>291</sup> retroactive seniority, periodic within-grade or step increases, and general pay raises during the relevant period.<sup>292</sup> Provision is made for enforcement of the final order should the agency prove to be recalcitrant. The Board may "issue a notice to any Federal employee who has failed to comply with an order to show cause why there was noncompliance"<sup>293</sup> and, where appropriate, certify to the Comptroller General that no payment shall be made to any employee failing to comply with the Board's order.<sup>294</sup> This would seem to be a very effective enforcement tool.

Employees who prevail on an appeal alleging discrimination prohibited by the Civil Rights Act of 1964<sup>295</sup> are entitled to several forms of relief, including offers of employment, backpay, special consideration for existing vacancies, priority consideration for future

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<sup>286</sup>*Id.* § 1201.116.

<sup>287</sup>*Id.* § 1201.113.

<sup>288</sup>*Id.* § 1201.116.

<sup>289</sup>5 U.S.C. § 5596.

<sup>290</sup>*Id.* § 5596(b)(1)(A)(i).

<sup>291</sup>*Id.* § 5596(b)(1)(B).

<sup>292</sup>*Bush v. Lucas*, 103 S. Ct. at 2416.

<sup>293</sup>5 C.F.R. § 1201.184.

<sup>294</sup>5 U.S.C. § 1205(d); 5 C.F.R. § 1201.184.

<sup>295</sup>42 U.S.C. § 2000e-16.

vacancies, retroactive promotion with back pay, cancellation of the unwarranted personnel action, correction of agency records, and priority promotion consideration.<sup>296</sup>

These remedies can prove quite beneficial, as demonstrated by the award of approximately \$30,000 in back pay to Bush,<sup>297</sup> but an aggrieved employee may seek further vindication in the courts. By statute, "any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board"<sup>298</sup> may obtain judicial review. Prior to so doing, the appellant must generally exhaust his or her administrative remedies.<sup>299</sup> Case law, however, has excused many failures to exhaust administrative remedies.<sup>300</sup> Most cases indicate that resort to the administrative machinery would have been an exercise in futility;<sup>301</sup> several do not discuss the issue. *Bush* is an example of the latter. Bush filed his action "while his administrative appeal was pending,"<sup>302</sup> but none of the courts that heard the case addressed the exhaustion question. Perhaps, this was because Bush's claim against Lucas was not one cognizable on its face in the administrative scheme.<sup>303</sup> Even so, the eventual outcome of the administrative action would have affected at least the relief to be afforded.

In any event, once the court determines that the case is ripe for review, it is required to

review the record and hold unlawful and set aside any agency action, findings or conclusions found to be:

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<sup>296</sup>29 C.F.R. § 1613.271.

<sup>297</sup>*Bush v. Lucas*, 103 S. Ct. at 2407.

<sup>298</sup>5 U.S.C. § 7703(a)(1) (added by Pub. L. No. 95-454, tit. II, § 205, 92 Stat. 1143 (1978)).

<sup>299</sup>*Daly v. Costle*, 661 F.2d 959 (D.C. Cir. 1981); *Walker v. Washington*, 627 F.2d 541 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 994 (1981); *Johnson v. Nelson*, 180 F.2d 386 (D.C. Cir.), *cert. denied*, 339 U.S. 957, *reh'g denied*, *id.* at 981 (1950); *Hills v. Eisenhart*, 156 F. Supp. 902 (N.D. Cal. 1957), *aff'd*, 256 F.2d 609, *cert. denied*, 358 U.S. 832 (1958). *See also* *Gleason v. Malcom*, 718 F.2d 1044 (11th Cir. 1983), in which a former officers' club bar manager sought to sue her superiors and co-workers for allegedly conspiring to violate her employment rights in violation of the Constitution and various statutory and regulatory provisions. The court dismissed the action because the plaintiff had failed to pursue her administrative remedies. The court found unpersuasive an attempt to distinguish *Bush* on the basis that her suit included a claim against co-workers as well as superiors.

<sup>300</sup>*E.g.*, *Athas v. United States*, 597 F.2d 722 (Ct. Cl. 1979); *Hanifan v. United States*, 354 F.2d 358 (Ct. Cl. 1965); *Mallow v. United States*, 161 Ct. Cl. 207 (1963); *Walsh v. United States*, 151 Ct. Cl. 507 (1963).

<sup>301</sup>*E.g.*, *American Federation of Gov't Employees v. Acree*, 475 F.2d 1289 (D.C. Cir. 1973).

<sup>302</sup>*Bush v. Lucas*, 103 S. Ct. at 2407.

<sup>303</sup>*See* *Daly v. Costle*, 661 F.2d 959 (D.C. Cir. 1981).

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule or regulation having been followed; or

(3) unsupported by substantial evidence, except that in the case of discrimination brought under any section. . . , the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.<sup>304</sup>

Prior to this explicit statement of the scope of review, reviewing courts had split somewhat on the issue of *de novo* determination.<sup>305</sup> Almost all, however, had limited their review to insuring compliance with agency procedure and probes for arbitrary, capricious or abusive agency action.<sup>306</sup> Some courts had held that the Administrative Procedure Act should define the scope of review,<sup>307</sup> but, for cases appealed from the MSPB, the question now seems resolved by statute.<sup>308</sup>

Presumably, if an employee were able to state a cause of action arising out of a controversy over a federal law, treaty, or the Constitution, even if the case could not be brought before the MSPB because it did not amount to a personnel action, a federal court could determine the matter under the jurisdictional grant to entertain cases involving federal questions.<sup>309</sup> The 1976 amendment to that section eliminated the \$10,000 jurisdictional amount where the action is brought against the "United States, any agency thereof, or any officer or employee thereof, in his official capacity."<sup>310</sup> Of course, not every agency action will state a cause upon which a court could base relief. Most courts have been reluctant to review internal agency management or personnel decisions,<sup>311</sup> but, as re-

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<sup>304</sup>5 U.S.C. § 7702(c).

<sup>305</sup>*Compare Ricci v. United States*, 507 F.2d 1390 (Ct. Cl. 1974) with *Richardson v. Haupten*, 373 F. Supp. 833 (D.D.C. 1974), *aff'd*, 527 F.2d 853 (D.C. Cir. 1975).

<sup>306</sup>*E.g.*, *Young v. Haupten*, 568 F.2d 1253 (7th Cir. 1977); *McGhee v. Johnson*, 420 F.2d 445 (10th Cir. 1969); *Taylor v. Civil Serv. Comm'n*, 374 F.2d 466 (9th Cir. 1967); *Colbath v. United States*, 341 F.2d 626 (Ct. Cl. 1965).

<sup>307</sup>*E.g.*, *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969).

<sup>308</sup>*Gypson v. Veterans Admin.*, 682 F.2d 1004 (D.C. Cir. 1982); *Doyle v. Veterans Admin.*, 667 F.2d 70 (Ct. Cl. 1981).

<sup>309</sup>28 U.S.C. § 1331, as amended by Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976); Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980).

<sup>310</sup>*Id.*

<sup>311</sup>*E.g.*, *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir.), *aff'd*, 341 U.S. 918 (1950); *Friedman v. Schwellenbach*, 159 F.2d 22 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1948); *Schwartz v. Federal Power Comm'n*, 423 F. Supp. 19 (D.D.C. 1976), *aff'd*, 578 F.2d 417 (D.C. Cir. 1978).

flected in *Doe v. United States Civil Service Commission*,<sup>312</sup> the trend<sup>313</sup> is to examine an agency's action under the relevant provisions of the Administrative Procedure Act (APA)<sup>314</sup> The APA is not itself a grant of jurisdiction<sup>315</sup> and contemplates an "agency hearing"<sup>316</sup> upon which review may take place. Most informal personnel actions are not premised upon a hearing; consequently, there appears to be some confusion about the scope of judicial review in these instances. For example, the APA requires agency action to be set aside if, *inter alia*, it is not supported by "substantial evidence."<sup>317</sup> The court in *Ford v. Department of Housing and Urban Development*,<sup>318</sup> however, held that a federal employee's discharge would be upheld if the decision could be supported on any rational basis.

Nonetheless a reviewing court which finds an unlawful agency action after applying the applicable standard of review may award back pay under the Back Pay Act<sup>319</sup> and order other remedial relief. The court may enjoin certain agency action in an appropriate case<sup>320</sup> and order reinstatement.<sup>321</sup> Thus, the employee is put "in the same position he would have been in had the unjustified or erroneous personnel action not taken place."<sup>322</sup>

It is apparent that the civil service scheme is as "elaborate" and "comprehensive" as the Supreme Court declared it to be in *Bush*.<sup>323</sup> In fact, the system's very complexity has caused it to be criticized:

<sup>312</sup>*Doe v. Civil Serv. Comm'n*, 483 F. Supp. 539 (S.D.N.Y. 1980).

<sup>313</sup>See *Etelson v. Office of Personnel Management*, 684 F.2d 918 (D.C. Cir. 1982); *National Federation of Federal Employees v. Devine*, 671 F.2d 607 (D.C. Cir. 1982); *Shepherd v. MSPB*, 652 F.2d 1040 (D.C. Cir. 1981); *Levin v. Connecticut Blue Cross, Inc.*, 487 F. Supp. 385 (N.D. Ill. 1980).

<sup>314</sup>5 U.S.C. § 706.

<sup>315</sup>*Califano v. Sanders*, 430 U.S. 99 (1977).

<sup>316</sup>5 U.S.C. § 706(2)(E).

<sup>317</sup>*Id.*

<sup>318</sup>450 F. Supp. 559 (E.D. Ill. 1978).

<sup>319</sup>5 U.S.C. § 5596.

<sup>320</sup>*Wallace v. Lynn*, 507 F.2d 1186 (D.C. Cir. 1974); *Thomas v. Veterans Admin.*, 467 F. Supp. 458 (D. Conn. 1979). The question of whether the availability of prospective relief, such as an injunction, constitutes relief sufficient to preclude a *Bivens* action has been raised, but not answered. The court, however, in *Bothke v. Fluor Engineers and Constr., Inc.*, 713 F.2d 1403 (9th Cir. 1983), gave a clue: "However, cases seem to have limited the preclusion question to whether the plaintiff has available certain alternative retrospective remedies, not whether the plaintiff might have prevented the violation with an injunction sought on the assumption that government officials would act illegally in the future." *Id.* at 1416 n.7.

<sup>321</sup>*Paroczay v. Hodges*, 219 F. Supp. 89 (D.D.C. 1963); *O'Brien v. United States*, 124 Ct. Cl. 655 (1953).

<sup>322</sup>S. Rep. No. 1062, 89th Cong., 2d Sess. 1 (1966).

<sup>323</sup>*Bush v. Lucas*, 103 S. Ct. at 2415.

The complex rules and procedures have, with their resultant delays and paperwork, undermined confidence in the merit system. Many managers and personnel officers complain that the existing procedures intended to assure merit and protect employees from arbitrary management actions have too often become the refuge of the incompetent employee. . . . For example, removal actions appealed by employees of 18 surveyed agencies took 48 days to process within the agency. Delays of over one year are not unknown, though. . . . The lengthy and complex appeals processes adversely affect employees and managers alike. The procedures are so confusing they often discourage the proper exercise of employee rights. . . . Managers embroiled in appeals often find that these processes consume all of their time and attention. Some managers simply avoid taking necessary steps to discipline or discharge employees in the first place.<sup>324</sup>

Even so, there are limitations to the system. It does not apply to every employee in the federal workforce, nor does it provide a remedy for every wrong. These limitations, together with those inherent in the system's very functions, may define the limitations of the *Bush* case as well. Consequently, it is worthwhile to explore these limitations in more detail.

## V. LIMITATIONS ON THE FEDERAL CIVIL SERVICE REMEDIAL SYSTEM

The most obvious limitation on the federal civil service remedial system is that it applies only to a well-defined group of employees. The effect of this limited coverage is muted somewhat by the fact that most federal employees are within the scope of the system. Nonetheless, a significant number of people drawing federal paychecks are not *bona fide* civil servants as defined by applicable law. At the outer edge of the employment pool are so called "indirect hire" personnel. These individuals are foreign nationals who reside in a host country wherein the United States government maintains a facility, such as a military installation, and who work for and are paid by the United States but are nominally employees of the host

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<sup>324</sup>S. Rep. No. 969, 95th Cong., 2d Sess. 3, 9-10, reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 27252, 2731-32.

country.<sup>325</sup> The Department of Defense alone employed over 50,000 of such workers in 1980.<sup>326</sup> Since, by definition, they are employed by the host country, they are not considered neither federal employees nor civil servants.

Also excluded from civil service coverage are the roughly two million members of the "uniformed services."<sup>327</sup> Uniformed services include members of "the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the Environmental Science Services Administration."<sup>328</sup> The armed forces include "the Army, Navy, Air Force, Marine Corps, and Coast Guard."<sup>329</sup> The armed forces should not be confused with military departments, which include "the Department of the Army, Department of the Navy and the Department of the Air Force,"<sup>330</sup> the various reserve components,<sup>331</sup> or the Department of Defense.<sup>332</sup> The armed forces are subordinate to the military departments, which, in turn, are subordinate to the Department of Defense.<sup>333</sup> Thus, civilian workers employed by a military department are not in the uniformed services and may or may not be part of the civil service.

Unless they are otherwise specifically included by statute, positions in the government of the District of Columbia are not within the civil service.<sup>334</sup> Nor are employees paid from "nonappropriated funds" of the Army, Navy, Air Force, Marine Corps, and Coast Guard nonappropriated fund activities so included.<sup>335</sup> These activities are instrumentalities of the armed forces which operate for the "comfort, pleasure, contentment and mental and physical improvement" of armed forces personnel.<sup>336</sup>

Within the civil service, there are "competitive" and "noncompetitive" positions,<sup>337</sup> sometimes called "classified" and

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<sup>325</sup> Ass't Sec'y of Defense for Pub. Affairs, Defense 80/Special Almanac Issue (July 1980).

<sup>326</sup> *Id.*

<sup>327</sup> 5 U.S.C. § 2101.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> 10 U.S.C. § 101(7).

<sup>331</sup> *See id.* § 261 (definition).

<sup>332</sup> *Id.* § 131.

<sup>333</sup> Defense 89/Special Almanac Issue, *supra* note 325.

<sup>334</sup> 5 U.S.C. § 2101(a)(3); 22 Op. Atty Gen. 59 (1898).

<sup>335</sup> 5 U.S.C. § 2105. *See American Federation of Gov't Employees v. Hoffman*, 543 F.2d 930 (D.C. Cir. 1976); *Boveen v. Culatta*, 294 F. Supp. 183 (E.D. Va. 1968).

<sup>336</sup> 5 U.S.C. § 2105(c).

<sup>337</sup> *Id.* § 2103.



"unclassified," respectively. Those positions that are not competitive, together with the "Senior Executive Service,"<sup>338</sup> constitute the "excepted service."<sup>339</sup> Also excluded from the competitive service are those positions within the executive branch "to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs."<sup>340</sup> As if these myriad distinctions were not sufficient, the law further distinguishes between those who have "competitive status" and those who do not. "Status" and "service" are different terms and have different meanings. A person is in the "competitive civil service" when he or she has "competitive status" and occupies a "competitive position."<sup>341</sup> Conversely, he or she is not in the competitive service, even when occupying a competitive position, if lacking competitive status.<sup>342</sup>

Only those in the competitive service have the full panoply of civil service protection described above.<sup>343</sup> They may be subject to some statutory or regulatory protection, but not the comprehensive, elaborate system of redress discussed in *Bush*. For example, in a case arising out of the Department of Agriculture, a court said:

An employee in the excepted service, however, is simply not entitled to the benefits accorded those in the competitive service. . . . Specifically, an employee in the excepted service, who is not a veteran, has no statutory or regulatory right to a statement of reasons [for his dismissal], or adverse action appeal rights.<sup>344</sup>

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<sup>338</sup>*Id.* § 2101a.

<sup>339</sup>*Id.* § 2103a.

<sup>340</sup>*Id.* § 2102(a)(1)(B).

<sup>341</sup>*Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1954); *Roth v. Braunell*, 117 F. Supp. 326 (D.D.C.), *rev'd on other grounds*, 215 F.2d 500 (D.C. Cir. 1953).

<sup>342</sup>*Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1954).

<sup>343</sup>*Chollar v. United States*, 126 F. Supp. 449 (Ct. Cl. 1954). Former civil servants who seek re-employment may be denied an opportunity to pursue *Bivens*-type actions by *Bush* even though they would not appear to be covered by the system. That was the position of the Fifth Circuit in *Carroll v. United States*, 721 F.2d 155 (5th Cir. 1983): "We cannot make a principal distinction between an employee and a former employee seeking re-employment, in the context as here presented, sufficient to base a holding that the teachings of *Bush v. Lucas* do not control." *Id.* at 156. This was a strange result because, in its original disposition of the case, the Federal Labor Relations Authority had concluded that an applicant for employment was not an employee and, hence, not entitled to retroactive placement or backpay. See *Carroll v. United States*, 707 F.2d 836, *rev'd on petition for reh'g*, 721 F.2d 155 (5th Cir. 1983).

<sup>344</sup>Committee for Protection of First Amendment Rights of Dep't of Agriculture Employees v. Bergland, 434 F. Supp. 314, 318 (D.D.C. 1974).

Of course, the procedural protections that are accorded to noncompetitive employees by statute or regulation must be followed whenever adverse action is taken:

Having chosen to proceed against petitioner on security grounds, the Secretary . . . was bound by the regulations which he himself has promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.<sup>345</sup>

On the other hand, the employee, whether part of the competitive service or not, cannot claim that the standard by which a disciplinary action is measured affords more procedural protection than the statute or regulation in question provides:

Here, appellee did have a statutory expectancy that he would not be removed other than for "such cause as will promote the efficiency of the service." But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulations, expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees . . . we do not believe that a statutory enactment . . . may be parsed as discretely as appellee urges.<sup>346</sup>

Probationary employees receive little protection. By statute:

The President may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation—

- (1) before an appointment in the competitive service becomes final; and
- (2) before initial appointment or a supervisor or manager becomes final. . . .<sup>347</sup>

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<sup>345</sup>*Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959).

<sup>346</sup>*Arnett v. Kennedy*, 416 U.S. 134, 152 (1974).

<sup>347</sup>5 U.S.C. § 3321, as amended by Pub. L. No. 95-456, tit. III, § 303(a), 92 Stat. 1146 (1978).

The current period of probation for final appointment in the competitive service is one year.<sup>348</sup> Agencies are free to set their own length of probationary periods for management and supervisory positions, provided that the periods selected are "of reasonable fixed duration."<sup>349</sup>

An employee serving a probationary period before final appointment in the competitive service may be dismissed either for "unsatisfactory performance or conduct" or for "conditions arising before appointment." If the former are the grounds upon which the dismissal is based, the employee is entitled only to written notification of why he or she is being discharged and of the effective date of the action.<sup>350</sup> If the latter is the reason for the discharge, the employee is entitled to advance written notice of the reasons for the termination, a reasonable time in which to prepare and present a written response, and a written notice of the final decision.<sup>351</sup> In either event, the employee may appeal to the Merit Systems Protection Board only if the appeal alleges that the action was "based on partisan political reasons or marital status," the "termination was not effected in accordance with the procedural requirements" of the particular regulatory section concerned, or the termination was "based on discrimination because of race, color, religion, sex, or national origin," age, or physical handicap.<sup>352</sup>

If the employee is serving a probationary term as a manager or supervisor, satisfactory completion of the prescribed period is a prerequisite to continued service in the position.<sup>353</sup> Failure to satisfactorily complete the term will permit the agency to assign the employee to "a position in the agency of no lower grade and pay than the employee left to accept the supervisory or managerial position."<sup>354</sup> In order to do so, the agency need only notify the employee in writing of its decision. The employee cannot appeal the decision to the MSPB unless he or she alleges that the action was based on "partisan political affiliation or marital status"<sup>355</sup> or if it is alleged that the adverse action was based on unlawful discrimination.<sup>356</sup>

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<sup>348</sup>5 C.F.R. § 315.801.

<sup>349</sup>*Id.* § 315.905.

<sup>350</sup>*Id.* § 315.804.

<sup>351</sup>*Id.* § 315.805.

<sup>352</sup>*Id.* § 315.806.

<sup>353</sup>*Id.* § 315.907.

<sup>354</sup>*Id.*

<sup>355</sup>*Id.* § 315.908.

<sup>356</sup>5 U.S.C. § 2302.

These minimal safeguards have withstood attack on due process grounds.<sup>357</sup> Reviewing courts have generally adopted a narrow scope of review and have refused to void discharges carried out in compliance with the rules and not found to be arbitrary or capricious.<sup>358</sup> Those few cases<sup>359</sup> that have implied a probationary employee's right to a hearing before dismissal run directly counter to the Supreme Court's analysis of a similar issue in *Arnett v Kennedy*.<sup>360</sup> It is apparent from even a loose reading of that case that the Court would not bifurcate the probationary employee's tenuous right to his or her job from the summary termination procedures prescribed by Congress and the President.

What is not so obvious is how the Court would react to a claim by a probationary employee that these same summary procedures provide *no* adequate redress for constitutional injuries and, consequently, entitle the probationer to bring a *Bivens*-type action directly against his or her federal superiors. Given the myriad exceptions to the summary procedure, the answer would depend to a considerable degree on the nature of the wrong involved. For example, the right to appeal to the MSPB for dismissals based on "partisan political" considerations would seem to encompass "whistle blowing" activity; one court has so held.<sup>361</sup> A major difference between a whistle blowing probationary employee and a tenured employee, like Bush, who criticizes his agency, is the availability of internal agency procedural protection. Appeal to MSPB is almost identical, but judicial review of the administrative decision also varies, as noted above. Whether these differences are sufficient to remove federal probationary employees from the sphere of those subject to the "comprehensive, elaborate" scheme found to be determinative

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<sup>357</sup>*Donovan v. United States*, 433 F.2d 522 (D.C. Cir.), *cert. denied*, 401 U.S. 944 (1970), *reh'g denied*, 402 U.S. 1005 (1971); *Jaeger v. Freeman*, 410 F.2d 528 (5th Cir. 1969); *Heaphy v. Department of Treasury*, 354 F. Supp. 396 (S.D.N.Y. 1973), *aff'd per curiam*, 489 F.2d 735 (2d Cir. 1974).

<sup>358</sup>*Toohey v. Nitze*, 429 F.2d 1332 (9th Cir.), *cert. denied*, 400 U.S. 1022 (1970). See cases cited in note 333 *supra*. *Accord United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983) (Claims Court lacked jurisdiction to review dismissal, allegedly based upon First Amendment violations, of probationary postal employee).

<sup>359</sup>*E.g.*, *Dargo v. United States*, 176 Ct. Cl. 1193 (1966).

<sup>360</sup>416 U.S. 134 (1974), *reh'g denied*, 417 U.S. 922 (1975).

<sup>361</sup>*Wren v. MSPB*, 681 F.2d 862 (D.C. Cir. 1982).

in *Bush* is not known.<sup>362</sup> On the one hand, probationary employees are far better off in terms of effective administrative and judicial remedies than was the plaintiff in *Davis v. Passman*,<sup>363</sup> but, on the other, they do not have as many protections as did *Bush*.

This issue, of course, is part of the larger question of the right to maintain a *Bivens*-type action by any federal employee not covered by the civil service system. As noted above, there are many categories of such personnel. The rights to redress afforded to each category under existing statutory and regulatory schemes must be carefully analyzed before one attempts to answer the question posed. To date, the Supreme Court has addressed only two groups. Uniformed personnel of the armed forces are precluded from maintaining such suits,<sup>364</sup> but congressional employees specifically exempted from remedial legislation may state such a cause of action.<sup>365</sup> In part, the answer will turn upon the thoroughness of the agency's internal remedies. Agencies which provide for comprehensive, substantive in-house systems of redress may well protect their management personnel from personal liability.<sup>366</sup> Whether they choose to do so will depend upon their assessment of the degree of flexibility lost in personnel decisions and other similar considerations. Since no agency can bestow jurisdiction on the MSPB, all such internal schemes would have to have administrative terminal points within the agency; a feature that may prevent them from being

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<sup>362</sup>While recognizing that a probationary employee does not have "recourse to the protections afforded his unprobationary co-workers" and that "it is damages or nothing" for such a plaintiff, the court, in *Francisco v. Schmitt*, 575 F. Supp. 1200, 1202 (E.D. Wis. 1983), held that such an employee cannot maintain a *Bivens*-type action against his or her superior: "[T]he fact that the federal employer-employee relationship is involved is a special factor that counsels hesitation, and this is so notwithstanding Congress' decision to exclude probationary employees from its remedial scheme." *Id.* at 1202. It is difficult to reconcile this result with *Bush*'s careful distinction between "covered" and non-covered actions or personnel: "Not all personnel actions are covered by [the Civil Service system]. For example, there are no provisions for appeal of either suspensions for 14 days or less . . . or adverse actions against probationary employees. . . . In addition, certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personal actions' with the statutory scheme." *Bush v. Lucas*, 103 S. Ct. at 2415 n.28. See also *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C. Cir. 1984), which cited *Bush* as authority for its holding that, "The district court, however, must entertain [plaintiff's] due process claims for damages attributable to wrongful conduct for which that scheme provides no remedy, along with those for injunctive relief." *Id.* at 1415.

<sup>363</sup>442 U.S. 228 (1979).

<sup>364</sup>*Chappell v. Wallace*, 103 S. Ct. 2362 (1983).

<sup>365</sup>*Davis v. Passman*, 442 U.S. 228, 246-47 (1979).

viewed as an effective constitutional substitute.<sup>366</sup> These inherent limitations, however, are not the only ones found in the system described by the Court in *Bush v. Lucas*. Limitations on the types of personnel actions subject to the system also exist.

Justice Marshall, in his concurring opinion in *Bush v. Lucas*, said that "there is nothing in today's decision to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme."<sup>367</sup> It is difficult to assess the validity of this proposition in the context of the facts and results in *Bush*. Bush, it will be recalled, was initially reduced in grade by his agency superiors. His lawsuit, however, was based on "defamation" and "violation" of constitutional rights.<sup>368</sup> In addition to reinstatement to the higher position and the resulting retroactive wage differential, Bush also sought attorney's fees and damages for "uncompensated emotional and dignitary harms."<sup>369</sup> It is by no means apparent that any of these asserted injuries were "attributable" to the personnel action taken against Bush. The majority did not address the point "[i]n light of [its] disposition of this case. . . ."<sup>370</sup> Certainly, the reduction and concomitant loss of wages were the result of an adverse personnel action, which, in turn, was premised on a presumed constitutional violation. The other injuries, however, may well have been independent of the reduction in grade. The Court implied that they were, in its assumption that they would go uncompensated within the civil service remedial system,<sup>371</sup> yet it nonetheless denied Bush the *Bivens* remedy. Consequently, it appears that

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<sup>366</sup>The United States Attorney's office apparently does not have a very effective system. In *Windsor v. The Tennessean*, 726 F.2d 277 (6th Cir. 1984), the court held that an Assistant U.S. Attorney could maintain a *Bivens* suit for damages against his superiors because he could not take advantage of civil service remedies and there was no statutory remedy for his allegedly wrongful discharge; *Bush* was distinguished on these bases.

<sup>367</sup>One such system is the regulatory scheme established by the military services to process complaints of non-appropriated fund employees. In *Dynes v. Army and Air Force Exchange Serv.*, 720 F.2d 1495 (11th Cir. 1983), the court held that the fact that the employer/employee relationship was governed by AAFES regulations rather than civil service rules was "inconsequential." "Because *Dynes* is a federal employee whose claim arises out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, *Bush v. Lucas* dictates that the regulatory scheme not be supplemented with a judicial remedy." *Id.* at 1498. The fact that these systems fail to afford review beyond the agency level was not discussed.

<sup>368</sup>*Bush v. Lucas*, 103 S. Ct. at 2407.

<sup>369</sup>*Id.* at 2408 n.9.

<sup>370</sup>*Id.*

<sup>371</sup>*Id.*



Justice Marshall's statement is, at least, overbroad. If, however, Justice Marshall meant only to say that employees who suffer a form of adverse action not cognizable by the remedial system may bring a *Bivens* action, even though they are otherwise covered by the civil service system, then he may well have stated the outer limits of the *Bush* holding. The majority opinion implicitly recognized the same point by noting that certain management actions either are not classified as "personnel actions" cognizable by the system or are not subject to the "elaborate, comprehensive" scheme of review, even though they are part of the system.<sup>372</sup> As examples of the former, the Court listed "wiretapping, warrantless searches, [and] . . . uncompensated takings."<sup>373</sup> It illustrated the latter by reference to the lack of appeal provisions for suspensions of 14 days or less and from adverse actions against probationary employees.<sup>374</sup> The Court did not say whether these omissions in coverage would warrant authorization of a *Bivens*-type action. It simply noted the gap in the system.

There are other examples as well. In certain instances, an employee may be reassigned within the agency against his or her will. Such reassignment may well aggrieve the employee, but is not an "adverse action" cognizable within the remedial system.<sup>375</sup> Reclassification of positions are most often not considered adverse actions,<sup>376</sup> as are reductions in force,<sup>377</sup> even though reclassification

<sup>372</sup>*Id.* at 2415.

<sup>373</sup>*Id.* n.28.

<sup>374</sup>*Id.*

<sup>375</sup>If an employee is willing to risk his position, he may resign involuntarily and seek review of both the reassignment order and resignation. *Pauley v. United States*, 419 F.2d 1061 (10th Cir. 1969).

<sup>376</sup>5 U.S.C. § 7512. See *Fucik v. United States*, 655 F.2d 1089 (Ct. Cl. 1981); *Leefer v. NASA*, 543 F.2d 209 (D.C. Cir. 1976); *Craig v. Colburn*, 414 F. Supp. 185 (D. Kan. 1976), *aff'd*, 570 F.2d 916 (10th Cir. 1978). As noted above, although not classified as "adverse actions" appealable to the Merit Systems Protection Board (MSPB), a reassignment or similar action may be the subject of a complaint filed with the MSPB Office of Special Counsel. The latter is required to investigate such complaints and determine whether reasonable grounds exist to support the employee's claim. If the investigation results in a finding of prohibited personnel practice, the Special Counsel may seek relief before the MSPB under the terms of 5 U.S.C. §§ 1206 (a)-(c) (1982). There are no provisions for judicial review of Special counsel's action in this regard. *Gilby v. United States*, 649 F.2d 449 (6th Cir. 1981). The availability of this avenue of redress was held "sufficiently adequate" to bar an employee aggrieved by his reassignment from bringing a *Bivens*-type action against his superiors in *Watson v. Department of Housing and Urban Dev.*, 576 F. Supp. 580, 586 (N.D. Ill. 1983). *Accord Broadway v. Black*, 694 F.2d 979 (5th Cir. 1982).

<sup>377</sup>*Newfield v. United States*, 138 F. Supp. 271 (Ct. Cl. 1956); *Powers v. Gold*, 124 F. Supp. 93 (D. Mass. 1954).

<sup>378</sup>*Fass v. Gray*, 197 F.2d 587 (D.C. Cir.), *cert. denied*, 344 U.S. 839 (1952); *Hills v. Eisenhart*, 156 F. Supp. 902 (N.D. Cal. 1957), *aff'd*, 256 F.2d 609 (9th Cir.), *cert. denied*, 358 U.S. 832 (1958).

may have the same detrimental effect on employees as do reductions in grade. Failure to promote is not considered an adverse action and generally may not be appealed to the MSPB.<sup>378</sup> Nor can a loss of 20-year retirement eligibility occasioned by reassignment within the agency be appealed.<sup>379</sup> There are other examples in the cases,<sup>380</sup> but these suffice to demonstrate the myriad actions that are not cognizable by the system.

There remains for discussion those instances in which no personnel action, *per se*, is taken against the employee; he or she is simply subjected to a violation of fundamental rights. In *Bivens*, the plaintiff's home was broken into and he was arrested, but no further action was taken. The Court nonetheless granted redress. In *Bush*, the Court noted that similar incidents may occur in the federal employment context, but failed to state whether an employee so aggrieved could sue. If one looks to *Bivens* alone, one would conclude that such an employee could proceed. *Bivens* must be reconciled with the result in *Bush*. *Bush* was prevented from seeking judicial redress despite the fact that the civil service remedial system did not provide him complete redress for his alleged constitutional injuries. If one concludes that injuries not covered *at all* by the system might be redressed in a *Bivens* suit, one must confront the anomaly that federal supervisors can limit their potential liability by merely increasing the harm done to the employee, since, presumably, the resulting adverse action would be cognizable by the system, and hence would divest the employee of a private right of action. It is believed that, ultimately, this anomaly will shape the future limits of the *Bush* decision. In the context of federal employment, Congress, or the Court, will have to decide that either there is no constitutionally based private right of action in the absence of "adverse action," or it will have to permit separate *Bivens* actions for damages not redressed adequately by the civil service system.

What of actions that are cognizable by the system? When there is no doubt that the adverse action complained of is covered by the statutory and regulatory scheme, does the system vindicate every constitutional injury?

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<sup>378</sup>*Latimer v. Department of Air Force*, 657 F.2d 235 (8th Cir. 1981); *Williams v. Department of Army*, 651 F.2d 243 (7th Cir. 1981).

<sup>379</sup>*Grasso v. IRS*, 657 F.2d 224 (8th Cir. 1981).

<sup>380</sup>*E.g.*, *Cook v. United States*, 536 F.2d 365 (Ct. Cl. 1976); *Hicks v. Freeman*, 273 F. Supp. 334 (M.D.N.C. 1967), *aff'd*, 397 F.2d 193 (4th Cir.), *cert. denied*, 393 U.S. 1064 (1968).

Justice Stevens, referring to the civil service remedial system described above, wrote in *Bush* that "[c]onstitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system."<sup>381</sup> Certainly, the system is equipped to deal with First Amendment issues, as a review of its structure will readily reveal. Its ability to do so is in large measure due to the fact that Congress has always had a special interest in protecting lower-level employees who speak out against their superior's wishes:

Congress has a special interest in informing itself about the efficiency and morale of the Executive Branch. In the past it has demonstrated its awareness that lower-level government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates' freedom of expression.<sup>382</sup>

As early as 1912, when the Lloyd-LaFollette Act<sup>383</sup> was enacted, Congress sought specifically to protect from retaliation civil servants who attempted to communicate directly with Congress about their working conditions.<sup>384</sup> Throughout the ensuing years, Congress has continued to look after the interests of these so-called "whistle-blowers":

Federal employees are often the source of information about agency operations suppressed by their superiors. Since they are much closer to the actual working situations than top agency officials, they have testified before Congress, spoken to reporters, and informed the public. Mid-level employees provide much of the information Congress needs to evaluate programs, budgets, and overall agency performance.<sup>385</sup>

Given this special interest, it is no surprise that the remedial system created by Congress adequately vindicates First Amendment claims. Other similar congressional interests such as equal employment opportunity can be identified and the concomitant extensive, remedial

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<sup>381</sup>*Bush v. Lucas*, 103 S. Ct. at 2415.

<sup>382</sup>*Id.* at 2417.

<sup>383</sup>37 Stat. 539, 555 (1912).

<sup>384</sup>*Id.* § 6. See also 48 Cong. Rec. 4813 (1912).

<sup>385</sup>*Bush v. Lucas*, 103 S. Ct. at 2417 (quoting Senate Comm. on Gov't Affairs, *The Whistleblowers*, 95th Cong., 2d Sess. (1978)).

machinery one would expect as a consequence can also be discerned.<sup>386</sup>

Not every interest protected by the Constitution, however, is of special concern to Congress. The Constitution protects interests which are unpopular and objects of public scorn, just as well as it shields those that are popular and universally acclaimed. The question is whether the civil service remedial system adequately vindicates the former as well as the latter and whether it is an effective substitute for a private right of action in every case.

The useful limits of *Bush* as a vehicle for further discussion of this issue are confined by his "whistleblower" status. To some, perhaps many, Bush was something of a folk hero, a high-minded civil servant willing to risk position and fortune for the benefit of the public good. In short, Bush was the very type of employee that Congress has taken a special interest in for at least 75 years. As stated earlier, it is really no surprise at all to find that Bush's claims were adequately addressed within the system. In order to answer the greater question of the system's ability to handle non-First Amendment claims, one must leave Bush and other "admirable" plaintiffs behind, for their very characteristics invariably determine the outcome. If the system's limits are to be thoroughly explored, it must be done with an employee who is not the object of special congressional protection, an employee who is covered by the system but not intentionally so, one whose cause is not popular.

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<sup>386</sup>For example, in the area of equal employment opportunity, the Court has found "the balance, completeness, and structural integrity of § 717. . . [inconsistent] with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other punitive judicial relief." *Brown v. G.S.A.*, 425 U.S. 820, 832 (1976). The existence of this system proved to be of little comfort to Air Force officials sued individually by an aggrieved employee in *Clements v. United States*, 568 F. Supp. 1150 (C.D. Cal. 1983). The plaintiff there had two actions, one based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), and one based on the Due Process Clause. The factual basis for the first "consisted of base officials circumventing their duty of advising plaintiff how to proceed within a complex regulatory system, destroying documents that tended to support [her] claims . . . covering up the same, removing plaintiff from her office prematurely, and isolating her from her peers." 568 F. Supp. at 1169. Distinguishing *Bush*, the court said:

Obviously the regulatory scheme under which she attempted to proceed does not allow or permit the failure or refusal of its administrators to execute its mandates without giving administrative due process. Thus, plaintiff had no viable, adequate, or meaningful remedy under the regulations of either the Civil Service or the Air Force to redress the failure and refusal to provide her administrative due process.

*Id.* Compensatory general and special damages in the amount of \$26,000 were awarded. Punitive damages in the amount of \$150,000 were assessed against the Air Force. Finally, the individual officer-defendants were assessed between \$1,000 and \$2,500.

Within this framework, let us create a model that will best serve our interests: Sam Employee has worked for the U.S. Navy as an assistant contract compliance officer at a large naval shipyard located in a large metropolitan area in the Northeastern United States for the past four years. Sam is not covered by a collective bargaining agreement. He is a GS-7 in the civil service and has direct contact with a host of other governmental personnel, both military and civilian. Sam is also a drug dealer, occasionally supplementing his Navy salary by selling assorted illicit drugs to other employees, both on and off the job. Let us assume that an undercover FBI agent, who had been brought into the shipyard by Navy officials to investigate the extent of a perceived drug problem, has broken into Sam's privately owned briefcase, which was lying on Sam's government desk, and discovered a "brick" of hashish therein. The agent acted on "pure hunch" and obtained neither a warrant nor authorization from the shipyard commander. He immediately reported his find to the base contract officer, a military official, who ordered Sam immediately suspended, pending further investigation. The ensuing investigation developed no further evidence but because possession of any illicit drug was grounds for discharge under applicable agency rules, Sam was given notice that the Navy intended to terminate him.<sup>387</sup> Can Sam find relief? Is a claim of unlawful search and seizure "fully cognizable within this system?"<sup>388</sup> If not, could Sam sue his superiors under a *Bivens* theory or does *Bush* preclude him from doing so?

To answer these questions, we must trace the progress of Sam's hypothetical case through the system. Since Sam is "an individual in the competitive service who is not serving a probationary or trial period,"<sup>389</sup> the Navy must comply with the statutory procedures for removal. The Navy thus would have to give Sam 30 days written notice, unless it chose to rely on the exception that such notice is not required if "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed"<sup>390</sup>—an exception which would be applicable under the facts, of the proposed termination, with specific reasons therefor. It would also have to allow Sam at least 7 days to respond, with the assistance

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<sup>387</sup>This hypothetical is loosely based upon an actual incident that occurred at the Philadelphia Naval Shipyard, as reported in the *Philadelphia Inquirer*, Sept. 29, 1983, at 3-B. The facts, however, have been liberally altered for the purposes of this article and are not meant in any way to reflect upon the individuals involved in the actual incident.

<sup>388</sup>*Bush v. Lucas*, 103 S. Ct. at 2415.

<sup>389</sup>5 U.S.C. § 7511; 5 C.F.R. § 752.301.

<sup>390</sup>5 U.S.C. § 7513; 5 C.F.R. § 752.301.

of an attorney, and it could provide him with a hearing.<sup>391</sup> Let us assume that applicable Navy regulations did not mandate a hearing and that Sam's response, drafted by his lawyer, vehemently objected to the discharge on the grounds that the only evidence supporting the assumption that Sam's discharge would "promote the efficiency of the service"<sup>392</sup> was the hashish "unlawfully" seized from Sam's briefcase. The statute which specifies the procedures to be followed does not state what evidence may be considered by an agency in making the determination of "cause as will promote the efficiency of service."<sup>393</sup> Nor does the regulatory implementation promulgated by the Office of Personnel Management provide any guidance.<sup>394</sup> The agency is on its own. Presumably, the agency would refer the issue to its personnel or legal section for advice. That department, in turn, would prepare an advisory opinion on the application of the exclusionary rule to administrative agency determinations, and probably would conclude that the exclusionary rule has seldom been applied to personnel decisions and that the evidence could be considered by the agency. With that opinion in hand, the decisionmaker would be required to consider the entire file and then provide Sam with a written decision.<sup>395</sup> The decision would in all likelihood be to discharge Sam.

Thus far, it does not appear that Sam's constitutional interest of freedom from unreasonable search and seizure has been vindicated. This of course, assumes, to a degree, that the search was unreasonable. This assumption that a violation had taken place was exactly the type that the Supreme Court made in *Bush*,<sup>396</sup> so making it is not without precedent. That fact should not, however, be allowed to obscure the critical nature of such an act for, by assuming constitutional rights have been infringed, one tends to gloss over the procedural machinery employed to reach such a conclusion. To a large extent, it is the nature of that very machinery that is at the heart of the issue. If the system is incapable of assessing the validity of constitutional claims, it cannot be an "equally effective substitute" for a personal cause of action based directly on the Constitution. In other words, if the civil service system is capable of determining whether Sam's termination would promote the efficiency of the

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<sup>391</sup>5 C.F.R. § 752.301.

<sup>392</sup>*Id.*

<sup>393</sup>5 U.S.C. § 7513.

<sup>394</sup>5 C.F.R. § 752.404.

<sup>395</sup>*Id.* § 752.404.

<sup>396</sup>*Bush v. Lucas*, 103 S. Ct. at 2408.



service because he possessed an illicit drug at his workplace, but is incapable of addressing the constitutionality of how those facts are established, then it is not an "equally, effective substitute" for a damages action. Conversely, if the system can address both issues, it would appear to be just as effective as the *Bush* Court asserted to be.

The next stage of the proceeding involves Sam's appeal to the Merit Systems Protection Board. The regulatory guidance at this stage is both more plentiful and more explicit. Sam is entitled to a hearing and his counsel may make motions,<sup>397</sup> including presumably a motion to suppress the fruits of the search. The regulations with regard to the admissibility of evidence, however, are not very helpful:

- (1) Evidence or testimony may be excluded from consideration by the presiding official if it is irrelevant, immaterial or unduly repetitious.
- (b) All evidence and testimony offered in the hearing but excluded by the presiding official, shall be described and that description made part of the record.<sup>398</sup>

The Navy's decision must be sustained if it is supported by a preponderance of the evidence.<sup>399</sup> It must be overturned, however, even if it meets this standard, if the MSPB determines the "decision was not in accordance with the law."<sup>400</sup>

It is not unusual that the regulatory materials do not provide more guidance concerning the exclusionary rule, since that rule has been judicially created and applied.<sup>401</sup> It is true that the exclusionary rule has been codified to some extent in many jurisdictions,<sup>402</sup> but such memorialization has usually taken place after the rule was firmly established by the courts. Consequently, one would expect to find the answer to Sam's motion to suppress in the Merit Systems Protection Board decisions that have interpreted regulatory evidentiary

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<sup>397</sup>5 C.F.R. § 1201.55. The constitutionality of the procedure whereby a federal employee is provided with a hearing only after dismissal was addressed in *Arnett v. Kennedy*, 416 U.S. 134 (1974). The Court held that due process required no more. See also *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>398</sup>5 C.F.R. § 1201.62.

<sup>399</sup>5 U.S.C. § 7701(c)(1); 5 C.F.R. § 1201.56(a)(ii).

<sup>400</sup>5 U.S.C. § 7701(c)(2); 5 C.F.R. § 1201.56(b)(3).

<sup>401</sup>*United States v. Leon*, 52 U.S.L.W. 5155 (U.S. July 5, 1984); *Massachusetts v. Sheppard*, 52 U.S.L.W. 5177 (U.S. July 5, 1984); *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>402</sup>See, e.g., *Mil. R. Evid.* 305 (exclusion of evidence obtained in violation of right to remain silent); 311 (exclusion of evidence obtained by unlawful search or seizure); 321 (exclusion of improper eyewitness identification).

standards. Unfortunately, that expectation is not fulfilled. No decision dealing with the exclusionary rule's application to MSPB proceedings in the context of a search and seizure has been reported since the MSPB began issuing opinions January 11, 1979. The Board apparently has not been confronted with the issue. While the Board has intimated that evidence obtained in violation of an individual's right to remain silent would probably be subject to exclusion at its proceedings, it has not explicitly so held.<sup>403</sup> It has also assumed that statements taken from an individual suspected of a criminal offense, in violation of his or her constitutional right to counsel would be subject to suppression or objection,<sup>404</sup> but it has not yet faced the search and seizure issue. The opinions of the MSPB's predecessor are of limited value, for the Board has said: "The past adjudicating practices of the former Civil Service Commission are not binding on this board."<sup>405</sup>

The approach that the Board has taken with regard to similar issues is one of reference to general federal law as it applies to the civil service. For example, in a case involving the application of an employee's right to remain silent in the face of questioning by the employer, the Board looked to related cases decided by the Supreme Court and other federal courts to determine the outcome.<sup>406</sup> The Board would doubtlessly use the same approach to resolve Sam's motion. The MSPB will not find the federal cases very helpful.

The exclusionary rule is not without its critics,<sup>407</sup> including, on occasion, the Chief Justice of the United States.<sup>408</sup> Nor has the Supreme Court been very cohesive in its approach to the rule:

Except for the unanimous decision written by Mr. Justice Day in *Weeks v. United States*, 232 U.S. 383, 54 L.Ed. 652, 34 S.Ct. 341 (1914) the evaluation of the exclusionary rules has been marked by sharp divisions in the Court. Indeed, *Wolf*, *Lustig*, *Rochin*, *Irvine*, *Elkins*, *Mapp*, and *Calandra*, produced a combined total of 27 separate signed opinions or statements.<sup>409</sup>

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<sup>403</sup>Asford v. Department of Justice, 6 MSPB 389 (1981).

<sup>404</sup>See *Chisolm v. Postal Serv.*, 7 MSPB 42 (1981).

<sup>405</sup>*Danko v. Department of Defense*, 5 MSPB 435.

<sup>406</sup>*Ashford v. Department of Justice*, 6 MSPB 389 (1981) (citing *Uniformed Sanitation Men v. City of New York*, 392 U.S. 280 (1968); *Confederation of Police v. Caulisk*, 489 F.2d 891 (7th Cir. 1973); *Kallines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973). See also *Chisolm v. Postal Serv.*, 7 MSPB 42 (1981).

<sup>407</sup>E.g., Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 Wash. U.L.Q. 621.

<sup>408</sup>See *Bivens*, 403 U.S. at 411-24 (Burger, C.J., dissenting); Burger, *Who Will Watch the Watchman?*, 14 Am. U.L. Rev. 1, 23 (1964).

<sup>409</sup>*United States v. Janis*, 428 U.S. 433, 445 n.15. (1976).

The rule, however, has survived. The difficulty is in determining when it applies:

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to preclude the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.<sup>410</sup>

Consequently, even though the rule's primary, if not sole, purpose is to deter future official misconduct,<sup>411</sup> the Court has never said that this purpose alone is sufficient to justify application of the rule: "Neither those cases nor any others hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment."<sup>412</sup> In deciding to apply the rule to any particular type of proceeding, the Court has employed a balancing test, that is, the potential benefits of applying the rule are weighed against the potential injury to the functions of the proceeding in question.<sup>413</sup>

The Court, however, has not limited the rule's application to criminal trials: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."<sup>414</sup> The rule has been applied to a variety of proceedings, including "quasi-criminal"<sup>415</sup> and other civil actions. These cases involve more than attempts to deter future illegal police conduct: "The cases extending the exclusionary rule to civil proceedings are based on the conclusion that it is the right of privacy that is protected and that there exists no valid distinction for varying the exclusionary rule in a civil case."<sup>416</sup>

But these cases too have not been unanimous in either approach or result:

Several cases decided both before and after the *Mapp* decision have held that such evidence was admissible, at least where it was not obtained by the action of govern-

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<sup>410</sup>*United States v. Calandra*, 414 U.S. 338, 358 (1974).

<sup>411</sup>*Janis*, 428 U.S. at 446 (quoting *Calandra*, 414 U.S. at 347).

<sup>412</sup>*Alderman v. United States*, 394 U.S. 165, 174 (1969).

<sup>413</sup>*United States v. Calandra*, 414 U.S. 338 (1974).

<sup>414</sup>*Camera v. Municipal Court*, 387 U.S. 523, 530 (1967).

<sup>415</sup>*Boyd v. United States*, 116 U.S. 616, 634 (1886).

<sup>416</sup>*State of Iowa v. Union Asphalt & Roadcoils, Inc.*, 281 F. Supp. 391, 408 (S.D. Iowa 1968).

mental agents. This position seems to find justification in the historical roots of the Fourth Amendment. . . . A few cases hold that evidence obtained even by agents of the government by illegal search and seizure may be admitted as evidence in civil cases. In a number of other[s] . . . evidence wrongfully seized . . . has been excluded.<sup>417</sup>

The exclusionary rule has been applied consistently in money and vehicle forfeiture cases,<sup>418</sup> and deportation cases.<sup>419</sup> It has also been used to exclude evidence in proceedings before the Securities' Exchange Commission,<sup>420</sup> the Federal Trade Commission,<sup>421</sup> the Labor Department,<sup>422</sup> and the Internal Revenue Service.<sup>423</sup> It has *not* been applied in a host of other proceedings, including a grand jury proceedings,<sup>424</sup> the Interstate Commerce Commission,<sup>425</sup> academic boards,<sup>426</sup> and some probation revocation commissions.<sup>427</sup>

Few of these cases, of course, are analogous to that presented to the MSPB by Sam's motion; *Powell v. Zuckert*,<sup>428</sup> a 1966 case, on the other hand, is. The appellant in that case was employed as a supervisory electronic engineer by the Department of the Air Force in Japan. A hearing was conducted to consider his discharge from employment after certain allegations of misconduct had arisen. Evidence illegally seized from the appellant was considered at the hearing and he subsequently was discharged. When the case reached the District of Columbia Circuit, the court ruled that the exclusionary rule should have been applied at the hearing: "It would seem wholly at odds with our traditions to allow the admission of evidence illegally seized by Government agents in discharge proceedings,

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<sup>417</sup>Annot., *Evidence—Search and Seizure*, 5 A.L.R.3d 670, 673-74 (1966).

<sup>418</sup>*One Plymouth Sedan v. Pennsylvania*, 381 U.S. 693 (1965); *Boyd v. United States*, 116 U.S. 616 (1886); *Berkowitz v. United States*, 340 F.2d 168 (1st Cir. 1965); *United States v. \$5,608.35*, 326 F.2d 359 (7th Cir. 1964); *United States v. One Lincoln Two Door Hardtop*, 195 F. Supp. 205 (D. Mass. 1961).

<sup>419</sup>*United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); *Wong Chung Che v. Immigration and Naturalization Serv.*, 565 F.2d 166 (1st Cir. 1977).

<sup>420</sup>*SEC v. First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981); *OKC Corp. v. Williams*, 461 F. Supp. 540 (N.D. Tex. 1978).

<sup>421</sup>*PTC v. Page*, 378 F. Supp. 1052 (N.D. Ga. 1974).

<sup>422</sup>*Savina Home Indus. v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979).

<sup>423</sup>*Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).

<sup>424</sup>*United States v. Calandra*, 414 U.S. 338 (1974).

<sup>425</sup>*Midwest Growers Co-Op v. Kirkemo*, 533 F.2d 455 (9th Cir. 1976).

<sup>426</sup>*Phillips v. Marsh*, 687 F.2d 620 (2d Cir. 1982).

<sup>427</sup>Annot., *Admissibility in State Probation Revocation Proceedings of Evidence Obtained Through Illegal Search and Seizure*, 77 A.L.R.3d 636 (1975).

<sup>428</sup>366 F.2d 634 (D.C. Cir. 1966).

which the [Supreme] Court has analogized to proceedings that involve the imposition of criminal sanctions. . . .<sup>429</sup>

The *Powell* court cited one other decision in support of its holding,<sup>430</sup> but it is by no means clear that the outcome would be the same if the case were decided today. *Powell* has been cited as authority on numerous occasions since it was decided, but most have concerned other issues.<sup>431</sup> It was cited recently as one of those "core cases which 'bar use of illegally seized items as affirmative evidence in the trial of the very same matter for which the search was conducted.'"<sup>432</sup> The Supreme Court has referred to it in a case involving the exclusion from a federal civil proceeding<sup>433</sup> of evidence illegally seized by a state official. In holding that such evidence could be used, the Court not only distinguished *Powell*, but it also refused to bless it: "The seminal cases that apply the exclusionary rule to a civil proceeding involve intrasovereign violations, a situation we need not consider here."<sup>434</sup> Since *Powell* was decided, the Supreme Court has refused to extend the exclusionary rule in a number of cases.<sup>435</sup> Consequently, *Powell's* precedential value is suspect. Nor is its persuasive force particularly compelling, since the court did not perform the balancing test mandated by the Supreme Court. Rather, it merely concluded that, since the search in question violated the Constitution, its use in a discharge case was forbidden.<sup>436</sup> This, of course, does not mean that the Merit Systems Protection Board would refuse to follow *Powell*. On the contrary, it may well do so when a similar issue presents itself to the Board. Nonetheless, *Powell* is not dispositive.

Another source to which the MSPB might turn for guidance in the proper disposition of Sam's motion is the private industrial law of labor arbitration. While the issues involved in the resolution of private sector labor disputes are considerably different from those found in public sector employment cases, the MSPB may consider

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<sup>429</sup>*Id.* at 640.

<sup>430</sup>*Saylor v. United States*, 374 F.2d 894 (Ct. Cl. 1967).

<sup>431</sup>*E.g.*, *Gifford v. Achison, Topeka and Sante Fe Ry. Co.*, 685 F.2d 1149 (9th Cir. 1981) (laches); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968) (legality of search involving foreign officials).

<sup>432</sup>*Lopez-Mendoza v. Immigration and Naturalization Serv.*, 705 F.2d 1059, 1070 (9th Cir. 1983) (quoting *Tirado v. Commissioner*, 689 F.2d 310, 311 (2d Cir. 1982)).

<sup>433</sup>*United States v. Janis*, 428 U.S. 433 (1976).

<sup>434</sup>*Id.* at 456.

<sup>435</sup>*E.g.*, *United States v. L.O. Ward*, 448 U.S. 242 (1980); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>436</sup>*Powell*, 366 F.2d at 640.

the existing similarities sufficient to justify such reference. Unfortunately, no uniform guidance on the application of the exclusionary rule is to be found there either.<sup>437</sup> There are cases which apply the rule<sup>438</sup> and cases which refuse to do so.<sup>439</sup> This divergence of opinion among arbitrators is not unexpected given the paucity of federal law directly on point and the multiplicity of contracts upon which the various opinions are based, and the limited influence of *stare decisis* in labor arbitration.

The MSPB may also consider Sam's personal interest in being free from unreasonable searches and seizures in determining the outcome of his motion to suppress. This consideration, however, would be limited, as the Supreme Court has made clear that personal interests are not determinative in such cases: "[I]n sum, the [exclusionary] rules is a judicially created remedy designed to safeguard Fourth Amendment rights generally, through its deterrent effect, rather than a personal constitutional right of the party aggrieved."<sup>440</sup> The *Bush* decision, too, would probably play a role in the outcome for, if the MSPB were to hold that the exclusionary rule did not or should not apply to its proceedings with regard to evidence illegally seized, an aggrieved federal employee may be deprived of the effective substitute for a private right of action that the Supreme Court envisioned in *Bush*, and may entitle the employee to proceed directly against his superior. On the other hand, if the MSPB were to follow *Powell* and conclude that unlawfully seized evidence cannot be used to support adverse personnel actions in the federal employment sector, it would seem clear that, under *Bush* the remedy thus provided would be exclusive. These conclusions are by no means certain, but the MSPB must of necessity consider their consequences when it inevitably faces the question.

The application of the exclusionary rule is only a part of the greater question of whether Sam or any other federal employee would find relief within the civil service system for constitutional wrongs perpetrated by their superiors. Whether or not the exclusionary rule should apply at agency or MSPB proceedings is a separate question from whether there has been invasion of an interest protected by the Constitution. If the agency is precluded from

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<sup>437</sup>See R. Fleming, *The Labor Arbitration Process* 187-94 (1965).

<sup>438</sup>*E.g.*, *Aldens, Inc.*, 58 Lab. Arb. Awards (CCH) 1213 (1972).

<sup>439</sup>*E.g.*, *Alden's, Inc.*, 61 Lab. Arb. Awards (CCH) 663 (1973); *Commodity Warehouse Corp.*, 60 Lab. Arb. Awards (CCH) 1260 (1972).

<sup>440</sup>*United States v. Calandra*, 414 U.S. 338, 348 (1974).



taking adverse personnel actions because the evidence upon which the action is based cannot be used to support it at a subsequent stage, then the constitutional interest is to some extent vindicated. That the system may not afford complete relief is, after *Bush*, of little consequence. If the agency is not so restrained, then the system would seem to afford no meaningful relief. Consequently, the *Bush* Court's rationale for refusing to authorize a private right of action against a federal superior would no longer be viable.

## VII. CONCLUSION

It may be concluded from the foregoing that there are limits to the proposition that federal employees may not sue their superiors personally for injuries consequent upon constitutional violations. *Bush v. Lucas* has indeed narrowed the bounds of those limits significantly, but it is readily apparent that the decision did not foreclose all such actions. The questions left unanswered by *Bush* will be resolved in future litigation, but the analysis used by the Court in that case will directly or indirectly influence their ultimate resolution.

Even though the particular wrong complained of by the plaintiff in *Bush* was grounded upon the First Amendment, nothing in the decision suggests that the result is limited to First Amendment issues. On the contrary, the particular relief sought was first fashioned by the Court in a case that dealt with a Fourth Amendment issue<sup>441</sup> and further extended in a suit based on the Fifth Amendment.<sup>442</sup> In fact, a constitutional claim involving other than a First Amendment issue may well have a greater chance of success because of the absence of the special congressional interest relied upon by the Court in part to justify its decision. It can be argued that, without that interest, Congress is in no better position than the courts to assess the impact of *Bivens*-type actions upon federal employment practices. It must be remembered, however, that *Bush* is not the only case limiting a federal employee's right to bring a suit directly under the Constitution.<sup>443</sup> To the extent that other cases preclude such actions, they are, of course, controlling.

Since the *Bush* decision was based primarily on the Court's assessment that the civil service remedial system constituted an adequate

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<sup>441</sup>*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>442</sup>*Davis v. Passman*, 442 U.S. 228 (1979).

<sup>443</sup>*E.g.*, *Brown v. G.S.A.*, 425 U.S. 820 (1976).

substitute for the personal cause of action sought by the plaintiff in the case, it is apparent that federal employees not covered by that system are not precluded from seeking such relief. Consequently, personnel on the federal payroll who are not classified as civil service employees or who have not obtained competitive status may be entitled to bring *Bivens*-type suits against their superiors. The apparent anomaly created by this distinction is offset by the fact that civil service employees are protected by a comprehensive scheme of law and regulation of which the non-civil service employee cannot avail himself.

Personnel covered by the system may not be precluded from bringing *Bivens* actions if the particular wrong suffered by them is not cognizable by the remedial scheme. Since the system's remedial aspects are triggered only by the more serious types of adverse actions, lesser harms may well go unredressed. Certainly, if no adverse action, as defined by the system, is taken, the system can afford no relief. Nothing in *Bush*, as Justice Marshall pointed out in his concurring opinion, precludes resort to the courts in such instances. As noted above, this could cause superiors to compound their wrongs by encouraging them to always take serious adverse action whenever a constitutional claim is involved in order to minimize their personal liability. On the other hand, employees who have suffered a constitutional wrong, but who have not had serious adverse action taken against them and who do not wish to pursue a *Bivens* remedy, could probably force the system to take cognizance of their complaint by taking the drastic step of "involuntarily resigning." Presumably, few employees would take this unattractive option.

Even if an employee's grievance is capable of being addressed by the system, it is not always clear that the system will afford him or her any meaningful relief. An employee who is discharged on the basis of illegally seized evidence will find little comfort in the fact that his or her constitutional claim was addressed, but not vindicated, by the system. Certainly, the extent to which meaningful relief is afforded by the system must be weighed by courts faced with future claims of personal relief. It is insufficient to say that such issues are part of "federal employment policy," or that they constitute matters in which Congress has special interest. For better or worse, the courts will be faced with such issues and must then assess the impact of granting the requested relief on the balance between government efficiency and employee rights. *Bush* must serve as a beginning for such an assessment but, given all the variables, it cannot provide all the answers.



By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.  
*General, United States Army*  
*Chief of Staff*

Official:

ROBERT M. JOYCE  
*Major General, United States Army*  
*The Adjutant General*

